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# *In the Supreme Court of the United States.*

OCTOBER TERM, 1915.

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No. 289.

THE UNITED STATES OF AMERICA, APPELLANT,

*v.*

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT ET AL.

No. 332.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT ET AL., APPELLANTS,

*v.*

THE UNITED STATES OF AMERICA.

---

*APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.*

---

**BRIEF FOR THE UNITED STATES.**

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**STATEMENT OF THE CASE.**

## **INTRODUCTION.**

These are cross appeals from a decree of the United States District Court for the Southern District of New York dismissing, except in one subordinate particular, a suit in equity brought by the United States under the Federal Anti-Trust Act, 26 Stat. 209, c. 647, to dissolve a combination of steamship lines in respect of the transportation of

steerage passengers between the United States and Europe. The case comes directly from the District Court as provided by the Expediting Act, 32 Stat. 823, c. 544; 36 Stat. 854, c. 428.

The petition charges that the defendants, comprising practically all the steamship lines engaged in the North Atlantic steerage trade, have entered into a combination in respect to the transportation of steerage passengers to and from the United States; have apportioned that business among themselves in definite percentages; have fixed rates; and also, by various unfair competitive practices, including the joint operation of "fighting ships," have driven from the field competitors outside the combination, and thus attained a virtual monopoly.

On demurrer the District Court held, December 20, 1911, that the petition stated a good cause of action under the Anti-Trust Act. *United States v. Hamburg American Line* (200 Fed. 806; 10 R. 5123). On final hearing, however, it reversed itself. Whilst apparently sustaining all essential allegations of fact contained in the petition,<sup>1</sup> it nevertheless held that the combination was a "reasonable one" and dismissed the petition absolutely except as to the subordinate feature of the "fighting ships" (Opinion, 216 Fed. 971; 10 R. 5127; Decree, 10 R. 5136).

The Record consists of 14 volumes. All of the oral evidence, together with the petition and answers, is contained in three volumes—11, 12, and 13. Volumes 1 to 10, inclusive, consist of docu-

<sup>1</sup> It did not find that the rates were excessive, as charged; but that was not an essential allegation. See *infra*, pp. 115-117.

mentary exhibits—agreements, resolutions, correspondence, etc.—of which the most important are the following:

Description of exhibits.	Volume and page.	Exhibit No.
Agreement A. A., the general pool agreement....	1 R. 49.....	3.
The Mediterranean Agreement.....	1 R. 95.....	6.
Minutes of Atlantic Conference.....	5 R. 2282, 2294, 2301, 2306, 2310.	705, 707, 708, 709, 712.
Minutes of American Atlantic Conference.....	1 R. 388- 424.	62-76.
Typical weekly statements showing percentage carried by each line.	5 R. 2448..	727.
Typical compensation accounts showing sums payable or receivable for variations from pool percentages.	7 R. 3382, 3401, 3597	1278, 1281, 1089.
Agreement adopting general schedule of rates for British trade.	5 R. 2697..	757.
Agreement adopting general schedule of rates for Scandinavian trade.	5 R. 2713..	758.
Agreement adopting general schedule of rates for Finnish trade.	5 R. 2664..	754.
Agreement adopting general schedule of rates for Continental trade.	9 R. 4895..	1644.
Fighting ship agreement.....	5 R. 2283, sec. 1.	705.
Typical compensation accounts dividing expense of fighting ships.	9 R. 4382, 4406, 4819, 4902, 4922.	1509, 219, 1630, 462, 1647.
Rule 9, boycotting agents of independent lines.	1 R. 219, 229.	20, 22.
Railroad agreements to refuse "commercial allowances" to independent lines.	1 R. 359-360, 376 - 377, Art. III sec. 1.	59, 60.
Tables showing carryings of each line and of the respective groups of lines each calendar year 1906-1911.	2 R. 533- 1041.	154-159.



The opinions of the court below, both on demurrer and on final hearing, together with the final decree and the Government's assignments of error, are in volume 10. The defendants' assignments of error on cross appeal are in volume 14.

#### DESCRIPTION OF DEFENDANTS.

The corporate defendants are as follows:

THE ALLAN LINE STEAMSHIP COMPANY, LIMITED, hereafter called the "Allan Line," a British corporation, operating from Portland, Boston, and Philadelphia to London, Liverpool, and Glasgow and return (Pet. 11 R. 3; Ans. Allan Line, 11 R. 148).

INTERNATIONAL MERCANTILE MARINE COMPANY, a New Jersey corporation, operating from New York and Philadelphia to Liverpool and Southampton and return. Its ships, together with those of its subsidiary company, defendant INTERNATIONAL NAVIGATION COMPANY, LIMITED, also operating from New York and Philadelphia to Liverpool and Southampton, are hereafter jointly referred to as the "American Line." Besides International Navigation Company, Limited, it also controls through stock ownership the defendants British and North Atlantic Steam Navigation Company, Limited, Societe Anonyme de Navigation Belge Americaine, and Oceanic Steam Navigation Company, Limited (Pet. 11 R. 4-5; Ans. 11 R. 104).

BRITISH AND NORTH ATLANTIC STEAM NAVIGATION COMPANY, LIMITED, a British corporation, hereafter called the "Dominion Line," operating from Port-



land to Liverpool and return (Pet. 11 R. 9; Ans. 11 R. 104).

SOCIETE ANONYME DE NAVIGATION BELGE AMERICAINE, a Belgian corporation, hereafter called the "Red Star Line," operating from New York and Philadelphia to Antwerp and return (Pet. 11 R. 14; Ans. 11 R. 104).

OCEANIC STEAM NAVIGATION COMPANY, LIMITED, a British corporation, hereafter called the "White Star Line," operating from New York and Boston to Liverpool and Southampton and return (Pet. 11 R. 17; Ans. 11 R. 104).

THE ANCHOR LINE (HENDERSON BROTHERS), LIMITED, a British corporation, hereafter called the "Anchor Line," operating from New York to Glasgow and return.

CANADIAN PACIFIC RAILWAY COMPANY, a Canadian corporation, operating a regular line of steamships, hereafter called the "Canadian Pacific Line," from Montreal, Quebec, and St. John in the Dominion of Canada to Liverpool, England, and return. It also owns and operates a transcontinental railroad which, partly through branches running into the United States and partly through connections with the Wabash and other American railroads, transports a substantial proportion (12%) of its steamship passengers to and from points in this country (Pet. 11 R. 7; Ans. 11 R. 204-205; Kerr 13 R. 1598-1612).

THE CUNARD STEAMSHIP COMPANY, LIMITED, a British corporation, hereafter called the "Cunard Line," operating from New York and Boston to Liv-

erpool in England, Fiume in Hungary, and Trieste in Austria, and return (Pet. 11 R. 8; Ans. 11 R. 229-230).

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN GESELLSCHAFT, a German corporation, hereafter called the "Hamburg-American Line," operating from New York to Hamburg and return (Pet. 11 R. 10; Ans. 11 R. 166).

NORD DEUTSCHER LLOYD, a German corporation, hereafter called the "North German Lloyd Line," operating from New York, Baltimore, and Galveston to Bremen and return (Pet. 11 R. 13; Ans. 11 R. 128).

NEDERLANDSH-AMERIKAANSCH E STOOMVAART MAATSCHAPIJ (HOLLAND-AMERIKA LIJN), a Netherlands corporation, hereafter called the "Holland-America Line," operating between New York and Rotterdam and return (Pet. 11 R. 12; Ans. 11 R. 86).

RUSSIAN EAST ASIATIC STEAMSHIP COMPANY, a Russian corporation, hereafter called the "Russian-America Line," operating between New York and Libau, Russia, and return (Pet. 11 R. 15; Ans. 11 R. 259).

The individual defendants are principal officers or general agents in this country of the defendant corporations, as follows:

BRYCE J. ALLEN is agent of the Allan Line at the port of Boston (Pet. 11 R. 4; Ans. 11 R. 222; Allan 13 R. 1428).

PHILIP A. S. FRANKLIN is vice-president of the International Mercantile Marine Company (Pet. 11 R. 6; Ans. 11 R. 104).

WILLIAM COVERLEY is general agent of the Anchor Line and manager of its business in the United States (Pet. 11 R. 7; Ans. 11 R. 68).

CHARLES P. SUMNER is general agent of the Cunard Line and manager of its business in the United States (Pet. 11 R. 9; Ans. 11 R. 255).

EMIL L. BOAS (now deceased) was resident director of the Hamburg-American Line and general manager of its business in the United States (Pet. 11 R. 11; Ans. 11 R. 186).

ADRIAN GIPS is general agent of the Holland-America Line in the United States (Pet. 11 R. 12-13; Ans. 11 R. 86).

GUSTAV H. SCHWAB (now deceased), HERMAN C. VON POST and GUSTAV H. SCHWAB, Jr., partners doing business under the firm name of Oelrichs and Company, were general agents of the North German Lloyd Line and in charge of its affairs in the United States (Pet. 11 R. 14; Ans. 11 R. 124).

ALEXANDER E. JOHNSON and MAX STRAUS, copartners under the firm name of A. E. Johnson and Company, are general passenger agents of the Russian-America Line in the United States (Pet. 11 R. 16; Ans. 11 R. 265; Straus, 12 R. 745).

#### DESCRIPTION OF THE BUSINESS.

The transportation of steerage passengers between the United States and Europe is a business of great importance. The average number of such passengers transported in each of the years 1907-1911, inclusive, was over 1,400,000 (2 R. 694, 776,862, 954). In 1911,

the year in which this suit was filed, the number was as follows:

East bound.....	515, 491
West bound.....	785, 765
Total.....	1, 301, 256

As the average steerage rate is \$35 (Nyland, 11 R. 509), the annual revenue from this traffic must be approximately \$50,000,000.

Speaking generally, the steamship lines carry not only steeragers but also first-class passengers, second-class passengers,<sup>1</sup> and freight. The ships are so constructed that whenever steerage travel is light the bunks and partitions in the steerage can be removed, making the space available for freight (Straus 12 R. 894).

The steamship lines are divided naturally and by long trade practice into three groups:

(1) The British Lines, comprising those whose eastern termini are in the British Isles or in Scandinavia, including Norway, Sweden, and Denmark.

(2) The Continental Lines, comprising those whose eastern termini are in continental Europe north of Cadiz, Spain, but excluding Scandinavia.

(3) The Mediterranean Lines, which, as their name indicates, operate from Mediterranean ports.

Representatives of these groups are accustomed to meet from time to time for discussion and concerted

<sup>1</sup> First and second class passengers are referred to collectively as "cabin" passengers. Some ships also carry third-class passengers, so-called; but for the purposes of this case third-class and steerage are the same (General Pool Agreement, 1 R. 60, Art. 13, Commentary a).

action on matters of mutual interest. This practice has given rise to permanent associations called conferences. The British Lines constitute the North Atlantic Conference, the Continental Lines the Continental Conference, and the Mediterranean Lines the Mediterranean Conference. The British Lines and the Continental Lines together constitute the Atlantic Conference.

#### HISTORY OF THE COMBINATION.

While this case is chiefly concerned with the so-called Agreement AA—the General Pool Agreement of February 5, 1908—described hereinafter, p. 12, nevertheless, in order to present the situation adequately, a brief reference to several earlier agreements is necessary.

The famous N. D. L. V.<sup>1</sup> agreement of January 19 1892, is the earliest known pooling arrangement in this trade (Ismaÿ, 12 R. 1007; Winter, 12 R. 1165, 1168; Govt. Ex. 2, 1 R. 3). It included only the Continental Lines and apportioned among them in definite percentages the steerage traffic, westbound and eastbound, between the United States and continental Europe.<sup>2</sup> The British Lines were not parties to this agreement, but 14 per cent of the continental traffic was set apart for them, that being the

<sup>1</sup> Nord-Atlantischer Dampfer-Linien Verband or North Atlantic Steamship Lines Combine.

<sup>2</sup> The original N. D. L. V. agreement covered only westbound traffic, but from the minutes of its later meetings and from subsequent agreements with other lines it is clear that it was subsequently extended to cover eastbound traffic also (6 R. 2749, m. 434, 435 a; 1 R. 83; 90; 165-166 m. 837-838; 179, m. 904, note).

proportion which on the basis of past carryings they might be expected to secure<sup>1</sup> (Winter, 12 R. 1166).

An agreement between the N. D. L. V. lines—i. e., the Continental Lines—and the British Lines, was contemplated, however, and on September 10, 1895, was entered into (Govt. Ex. 745, 5 R. 2604). By this agreement the Continental Lines entirely withdrew from the transportation of steerage passengers between British, Scandinavian, and Finnish ports and the United States, both westbound and eastbound (5 R. 2604, sec. 2; Ismay, 12 R. 1035). In return the British Lines accepted 6 per cent<sup>2</sup> as their share of the continental steerage traffic with the United States and promised to maintain minimum rates not lower than the lowest rate fixed by the Continental Lines (5 R. 2604, secs. 3, 5, 6). There were also provisions for the compilation of pool statistics, for the payment of compensation in case the allotted percentages were exceeded by either group, and otherwise insuring the agreed distribution of traffic.

By a separate pooling agreement dated June 27, 1896, the British Lines apportioned among themselves the 6 per cent of continental business allotted to them (5 R. 2608; Ismay, 12 R. 1036).

These agreements have all been renewed from time to time and theoretically at least are still in existence, though largely superseded in fact by the General Pool

<sup>1</sup> At that time there were no direct Mediterranean Lines to be considered (Winter, 12 R. 1165).

<sup>2</sup> The 14 per cent set apart for the British Lines in the original N. D. L. V. agreement included the Scandinavian trade (1 R. 5, Commentary to Article I).

Agreement (Winter, 12 R. 1165; 1 R. 157, Resolution 801; 6 R. 2741, 2749; 5 R. 2621; Ismay, 12 R. 1037; Cauty, 12 R. 1092).

In 1902 dissension arose, due partly to the establishment by the Cunard Line at the request of the Hungarian Government of a direct Mediterranean service from Fiume, Hungary (Winter, 12 R. 1175-1178, 1181), and partly to a contest for first-cabin business precipitated by the building of new vessels with luxurious first class accommodations<sup>1</sup> (Winter, 12 R. 1178-1181). These difficulties were composed in 1905 but broke out afresh in 1907 with the building of the *Mauretania* and *Lusitania* (Winter, 12 R. 1176, 1182, 1188-1190). This second disagreement was of brief duration. Late in 1907 negotiations began which resulted, February 5, 1908, in Agreement AA—the General Pool Agreement—discussed hereinafter p. 12 (Winter, 12 R. 1190; Govt. Ex. 3, 1 R. 49).

Meanwhile, with the growth of traffic between southeastern Europe and Asia and the United States, direct Mediterranean lines had sprung up, particularly lines from Italy and Greece. These lines commenced to bid for continental traffic. The Continental Lines in turn sought Mediterranean traffic. A period of competition ended with the so-called Mediterranean Steerage Traffic Agreement of February 8, 1909, by which the Mediterranean Lines withdrew from continental business both eastbound and westbound, and the

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<sup>1</sup> This case has nothing to do with the first-class passenger business.



British and Continental lines, except those having direct Mediterranean services, withdrew from Mediterranean business both eastbound and westbound<sup>1</sup> (Govt. Ex. 6, 1 R. 95, 104, Article 17; Nyland, 11 R. 545; Richard, 12 R. 804-805; Winter, 12 R. 1191). This agreement is still in effect (Ismay, 12 R. 1043). Incidentally, the Mediterranean Lines are parties to pooling agreements of their own, similar to Agreement AA, covering this Mediterranean business from which the British and Continental lines withdrew (1 R. 95-96, 113-114, 116-117; 5 R. 2426-2428, 2434-2435).

As a result of these arrangements the trans-Atlantic steerage traffic is divided into two parts, (1) the North Atlantic traffic, including passengers from the British Isles and continental Europe north of Cadiz, Spain; (2) the Mediterranean traffic, principally from Italy, Greece, and Asiatic countries. As to each, competition is suppressed by pooling agreements among the interested lines. The defendants in this suit are engaged in the North Atlantic traffic.

#### THE GENERAL POOL AGREEMENT.

Agreement AA, known as the General Pool Agreement, which is the foundation of the present case, was entered into February 5, 1908, by both the N. D. L. V.

<sup>1</sup> Though all the Mediterranean Lines were not originally parties to this agreement, they subsequently became so; the French Line, the American Line, and the White Star Line under Special Agreement A, February 18, 1909 (1 R. 116; Ismay, 12 R. 1043); the Austro Americana Line and the Cunard Line by Special Agreement B, October 1, 1908 (1 R. 113), and Special Agreement E, January 1, 1910 (5 R. 2426; Ismay, 12 R. 1042-1043; and the Greek Lines by Special Agreement E, January 1, 1910 (5 R. 2426), and Special Agreement F, January 1, 1910 (5 R. 2432).



or Continental Conference Lines and the British or North Atlantic Conference Lines. The original parties were—

The Allan Line,  
 The Anchor Line,  
 The Cunard Line,  
 The Hamburg-American Line,  
 The Holland-America Line,  
 The North German Lloyd Line,  
 The Red Star Line,  
 International Mercantile Marine Company,  
 The Canadian Pacific Railway Company (Atlantic steamship lines),  
 The French Line.

(1 R. 50-51; 1 R. 81, Appendix III, clause f; Sandford, 11 R. 334-335; Winter, 13 R. 1412.)

Agreement Z, dated February 5, 1908, admitted certain Canadian lines, namely, the Allan Line (Canadian Services), the Dominion Line and the Donaldson Line (5 R. 2667; Ismay, 12 R. 1041).

Agreement BB, dated September 1, 1908, admitted the Russian East Asiatic Line (5 R. 2682; Ismay, 12 R. 1041; Straus, 12 R. 776-777, 742-743; Ans. 11 R. 259, sec. 2).

The Royal Line, a subsidiary of the Canadian Northern Railroad Company, was admitted by Agreement CC, August 15, 1910 (5 R. 2413), and Agreement DD, August 15, 1910 (5 R. 2412; Kerr 13 R. 1603; Ismay, 12 R. 1042; Winter, 12 R. 1192).

The Scandinavian-American Line was admitted by two agreements dated March 3, 1910 (5 R. 2358,

sec. 1; 5 R. 2362; Ismay, 12 R. 1028; Minutes of the Atlantic Conference, 5 R. 2337, m. 87; 2339-2342; 2347, m. 120; 2351, m. 134; 2355, m. 150; Govt. Ex. 715, 5 R. 2372).

Thus the General Pool Agreement included or has come to include practically every steamship line engaged in the steerage traffic between the United States and all of Europe north of Cadiz, Spain, including the British Isles and Scandinavia. The only exceptions are the Russian Volunteer Fleet, which was soon driven out of business, and the New York and Continental Line, which commenced after the pool was formed and which, twice ruined and forced to reorganize by the unfair and oppressive practices of the combination hereinafter set forth, persists to-day in an insolvent condition as the Uranium Line, the sole surviving independent (Winter, 12 R. 1192; 13 R. 1420-1421; Thomas, 13 R. 1702, 1703).

The General Pool Agreement is reproduced in full in the record (1 R. 49), and in substance provides as follows:

(1) The parties guarantee to each other certain definite percentages of the entire steerage traffic carried by them both eastbound and westbound between European ports and the United States and Canada, except Mediterranean passengers (1 R. 51-53, Arts. 1-3).

(2) Any line exceeding its allotment must pay into the pool a compensation price of £4 for each excess passenger, which sum is to be paid proportionately to

the line or lines which have not carried their full quota. It is expressly stated that this provision "forms one of the main features of the entire contract" (1 R. 55-56, Art. 6).

(3) Each line must make a weekly report of the number of steerage passengers carried, and from these the secretary of the pool compiles weekly statements showing the pool position of each line. He also prepares each month provisional accounts of the compensation due from lines which have exceeded their quota. This must be paid immediately on pain of heavy penalties. Final settlements are made at the end of each year (1 R. 57, Art's 8 and 10).

(4) Each line undertakes to arrange its rates and service in such manner that the number of steerage passengers it actually carries shall correspond as nearly as possible with the number allotted to it by the contract. If any line exceeds its proportion it is in duty bound to adopt measures calculated to bring about a correct adjustment. The other lines may either await the action of the individual line or a majority of the lines representing 75 per cent of the pool shares can immediately order rates on a plus line to be raised or rates on a minus line to be lowered, and from this order there is no appeal. It is expressly stated, however, that "all parties were unanimously of the opinion that the adjustment is, whenever practicable, to be effected not by reducing the rates of one Line but on the contrary by *raising* the rates of one or several of the Lines" (1 R. 58, Art's 9 and 11).

(5) No line has the right to alter its steerage rates without having previously informed the secretary; i. e., all lines are bound to maintain existing rates until the other pool members are notified (1 R. 60, Art. 12).

(6) No circulars or publications shall be issued by any line reflecting upon or instituting comparisons with any other conference line unfavorable to the latter, and no party shall support (advertise in) any newspaper which shall systematically attack any conference line (1 R. 63, Art. 16).

(7) To insure the faithful performance of the agreement, each line deposits with the secretary a promissory note in the amount of £1,000 for each per cent of traffic allotted to it in the pool. From this amount penalties may be collected ranging from £250 for smaller infractions to the forfeiture of the entire deposit if the line withdraws from the agreement before its expiration, refuses to pay compensation money, or assists directly or indirectly any opposition line (1 R. 64-66, Art's 17-21).

(8) New lines may be admitted or the terms of the agreement altered only by unanimous vote, unless otherwise provided in the contract (1 R. 66, Art. 22).

(9) To assist in the carrying out of the agreement a Secretary was appointed—Mr. H. Peters at Jena, Germany (1 R. 67, Art. 23; Ismay, 12 R. 1017). Arbitrators are also provided for (1 R. 67-68, Art's 23 and 24).

(10) Regular meetings are to be held alternately at London and Cologne for the purpose of carrying

out this agreement and agreements collateral thereto (1 R. 71, Art. 25). These meetings constitute what is called The Atlantic Conference (Cauty, 12 R. 1047). A considerable portion of the minutes of The Atlantic Conference, showing the various matters discussed and the action taken thereon, are set forth in the record (5 R. 2282, Govt. Ex. 705; 5 R. 2301, Govt. Ex. 708; 5 R. 2310, Govt. Ex. 712).

Representatives of the Atlantic Conference Lines likewise meet in New York in what is called the American Atlantic Conference or New York Conference, the secretary of which, at the time this suit was filed, was Mr. Lawson Sandford (Sandford, 11 R. 292, 312-313, 339; Cauty, 12 R. 1047; Ismay, 12 R. 1016; Minutes American Atlantic Conference, 1 R. 388; Letter showing object of American Atlantic Conference, 6 R. 2873). Minutes of the American Atlantic Conference are also in the record (Govt. Ex's 61-76, 1 R. 385-419).

(11) The agreement was originally for three years, until February 22, 1911, and thereafter from year to year unless notice should be given on or before December 1, 1910 (1 R. 73, Art. 27). December 3, 1910,<sup>1</sup> it was renewed for five years (Ismay, 12 R. 1031).

It is not disputed that the terms of this agreement have been and are being faithfully carried out—that the pool percentages have been accepted, weekly statistics circulated of steerage passengers carried by the various lines, rates raised and lowered, and com-

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<sup>1</sup> One month before this suit was filed, January 4, 1911.

pensation payments regularly collected from the lines exceeding their quota and distributed to those falling short (Ismaÿ, 12 R. 1019, fol. 3057; Lister, 13 R. 1532; Franklin, 13 R. 1800).

#### RATE FIXING BY THE COMBINATION.

The fixing of rates is the primary purpose to which all other provisions of the General Pool Agreement—such as the apportionment of traffic—are subordinate. The defendants do not deny this. As testified by Cauty, vice president of the International Mercantile Marine (12 R. 1092–1093):

Now, in arriving at a pool we did not say to ourselves "This business must be pooled." I do not know whether you can understand the distinction; I want to make it clear. We did not approach it as a pool with one object in view. We had been working almost entirely up to then under rate agreements, and I may tell you it was a very, very difficult thing when you had to give a separate minimum rate to each individual steamer on the Atlantic. We did accomplish that in respect of first and second-class passengers, but with regard to third-class the difficulties between the various lines were insurmountable, and I think I can say that for nearly two years negotiations were going on in a desultory fashion between various interests in an endeavor to find some way out of this deadlock in regard to third-class business, and it was only after considering a great many different ways of arriving at a solution of the question



that this pool, the AA Agreement, about which so much has been said, was made. *That pool was established as an alternative to a rate agreement*, and we have found it has got over a great many of the difficult questions which had to be considered in connection with third-class business. [*Italics ours.*]

To the same effect see Hannah, 13 R. 1466, 1474, 1476-1477; Lister, 13 R. 1495-1496; Cauty, 12 R. 1079; Circular letter, 7 R. 3318 fol. 9954.

In stating that the combination fixes rates we do not refer merely to the provisions in Agreement AA permitting lines representing 75 per cent of the pool shares to alter individual rates for pool adjustment purposes, and requiring each line to maintain existing rates until notice has been given to the other parties. *We refer also to the adoption of whole schedules of rates and to the inauguration of general and uniform advances.*

In Agreement AA itself a general schedule of rates was approved (Appendix I, sec. (2), 1 R. 76). Subsequent changes were made as follows:

A general schedule of Scandinavian rates was adopted February 20, 1908, and with amendments is in effect to-day (5 R. 2713; Ismay, 12 R. 1040).

A general schedule of British rates was adopted May 23, 1908, amended August 15, 1910, and is in effect to-day (5 R. 2697; Ismay, 12 R. 1042).

It seems to have been the practice to fix the Continental rates at the beginning of each year. The last schedule of continental rates shown in the record

is that agreed upon effective January 1, 1911, three days before this suit was filed (9 R. 4895, Govt. Ex. 1644).<sup>1</sup>

The officers of the defendant lines themselves admitted that the present steorage rates are *all* reached by agreement.

For example, Franklin, vice president of the International Mercantile Marine, testified (13 R. 1825-1826):

Q. And the rates both under "AA" and under the first and second-class agreements have been fixed by agreement, have they not?

A. *They are all fixed to-day by agreement.*

Q. But they have been, have they not, since those agreements have been in effect?

A. *They have been practically since 1908.*  
[Italics ours.]

<sup>1</sup> For other instances of rate fixing by general agreement see 8 R. 3909; 7 R. 3340 et seq.; 6 R. 2871, 2893, 3169, 3182, 3188, 3194, 3195; 5 R. 2254, 2255, 2257, 2267, 2659, 2664; 4 R. 2000, 2012, 2013, 2069; 9 R. 4545-4548; Lister 13 R. 1496, 1544-1545; 8 R. 4301-4302 m. 18, 19, 20; Franklin, 13 R. 1815, 1825-1826.

That an individual line might theoretically initiate changes in its own rates on notice to the other parties is of course immaterial. The rates so initiated are subject to the control of a majority of the lines representing 75 per cent of the shares, and rate changes resulting in deviation from allotted percentages are not tolerated (1 R. 59, Art. 11). As said by this court in *United States v. Joint Traffic Assn.*, 171 U. S. 505, 563:

"It is obvious, however, that if such deviation from rates by any company from those agreed upon, be tolerated, the principal object of the association fails of accomplishment, because the purpose of its formation is the establishment and maintenance of reasonable and just rates and a general uniformity therein. If one company is allowed, while remaining a member of the association, to fix its own rates and be guided by them, it is plain that as to that company the agreement might as well be rescinded. This result was never contemplated. \* \* \* the board undoubtedly has authority and power to enforce the uniformity of rates \* \* \*."



Similarly, Winter, passenger manager of the North German Lloyd, testified (13 R. 1748):

Q. They [steerage rates] have increased to a certain extent, have they not?

A. Yes, with the demand.

Q. And the rates practically now are \$35?

A. Yes, on an average.

Q. *That is by agreement amongst the lines also?*

A. Yes, and the demand. [*Italics ours.*]

The following correspondence illustrates how general advances take place:

*Circular letter, March 30, 1908, Secretary Peters to Pool Members (7 R. 3305):*

On Thursday last I informed the Parties that the Continental Lines intended to advance steerage rates all round four dollars except for Continental steamers sailing about same date as steamers of opposition lines, and that they further intended to advance westbound steerage rates all round by ten marks, requesting British Lines to increase their eastbound and westbound Continental steerage rates accordingly.

To-day I wired as follows:

"All lines have agreed immediate advance Continental steerage rates eastbound four dollars, westbound ten marks."

*Circular letter, April 10, 1909, Secretary Peters to Pool Members (8 R. 3918):*

The Mediterranean Lines having finally agreed to increase their eastbound rates by three dollars after 17th instant and Mr. Smyth having informed me that the British Lines will

agree to the proposed advance of Continental eastbound steerage rates when the Mediterranean Lines have advanced theirs, I shall cable Mr. Sandford on Thursday next, that circulars announcing the immediate advance of Continental eastbound rates by three dollars are to be issued on April seventeenth.

*Letter, August 21, 1908, White Star Line to Ismay, Imrie & Co. (6 R. 3194):*

Scandinavian-Finnish prepaid }  
Third-Class Rates. }

We have just received through the Secretary of conference copy of cable just received from Secretary Smyth, reading as follows:

"All Lines agreed advance Scandinavian-Finnish prepaids \$1.25 for aliens, except "Lusitania" "Caronia" class \$1.50 to rectify parity rates, and charge \$4.00 less citizens, Canadians, in force 24th."

We will, of course, take joint action with the other Lines and circularize agents promptly, notifying them that the new rates will go into effect Aug. 24th.

#### UNFAIR METHODS OF COMPETITION AGAINST INDEPENDENT LINES.

The parties to the General Pool Agreement above described—the Atlantic Conference Lines—have concertedly employed the following unfair and oppressive methods to destroy the few independent lines that have existed and to prevent the creation of new ones:

1. The use of "fighting ships."

2. Boycotting agents who sell tickets for independent lines.

3. Requiring railroads to discriminate against independent lines in the payment of "commercial allowances."

By these methods they have driven out one competitor—the Russian Volunteer Fleet; have forced another—the Russian East Asiatic Company—to join the pool; and have inflicted such severe losses upon a third—the New York and Continental Line—that it has been twice compelled to reorganize, first as the Northwest Transport Company and second as the Uranium Line, and exists to-day in an insolvent condition sustained only by the large financial resources of certain of its stockholders. (*Infra*, pp. 29–33.)

#### 1. FIGHTING SHIPS.

Whenever a line outside the combination advertised an eastbound steamer to sail on a specific date, one of the lines in the combination, in accordance with the common design, would immediately advertise the sailing of an opposition steamer<sup>1</sup> on the same or about the same day and at the same or lower rates. These were called "fighting ships" by the defendants themselves (9 R. 4922, 4902, 4832, 4382; 5 R. 2316 (m. 45); 2332 (m. 75); 2335 (m. 79); 4 R. 2092–2093; 1 R. 275). Usually the rate advertised for the fighting steamer was \$1 below the rate advertised by

<sup>1</sup> Designated by the so-called "Small Committee" appointed for that purpose in New York (Nyland, 11 R. 454–455; Cauty, 12 R. 1053; Winter, 12 R. 1158).

the outside line.<sup>1</sup> The outside line would then reduce its rate and the fighting steamer would follow with another reduction (Fourman, 11 R. 559, 568-569, 573-585), with the result that both steamers usually sailed at rates far below those normally charged, in fact so low as necessarily to result in losses to both parties (Ans., 11 R. 137, 155, 174; Fourman, 11 R. 566-569).

The line furnishing the fighting steamer was compensated for its losses by contributions from the other parties to the combination in proportion to their interest in the pool (9 R. 4382, 4406, 4902; Cauty, 12 R. 1055). If the fighting steamer booked more passengers than it could carry they were distributed among the steamers of other members of the combination, and for these passengers also compensation was paid by the entire pool (Nyland, 11 R. 479, 537-538). Thus, by distributing the loss among the several members of the combination each constituent line would suffer proportionately much less than the one line which was being fought by the entire group and which must inevitably soon exhaust its resources in the unequal contest (6 R. 2801, fol. 840; Ismay, 12 R. 1023).

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<sup>1</sup> Some of defendants' witnesses testified that the fighting steamers did not undercut the rates of the independent lines. In so testifying, however, they referred to *net* rates, the independent lines being obliged to pay their ticket agents a commission of \$3 per passenger as against a \$2 commission paid by the conference lines, because the independent agents were boycotted by the conference lines and therefore received income from only one instead of several companies (Fourman, 11 R. 564). The fact remains, however, that the *published* rates of fighting steamers were lower than the published rates of the independent lines (Fourman, 11 R. 559, 567-569, 573-578; Winter, 12 R. 1164; 1 R. 449-450).

This scheme was agreed upon at a meeting of the Atlantic Conference held at the Savoy Hotel, London, May 25, 1908, shortly after Agreement AA, the General Pool Agreement, was entered into (5 R. 2282; Ismay, 12 R. 1018, 1019; Cauty, 12 R. 1049, 1055), and was subsequently incorporated in the minutes and by-laws of the Atlantic Conference as By-Law 22 (5 R. 2310). As such it forms part of Agreement AA itself (1 R. 80, m. 21; 9 R. 4516, 4517, Minute 128).

The fighting ships were so effective, in conjunction with other oppressive practices, that before the end of 1908 all outside opposition was gotten rid of. The Russian Volunteer Fleet went out of business in July (Sandford, 11 R. 358; Fourman, 11 R. 561; Richard, 12 R. 790). The New York and Continental Line went out of business in August (Richard, 12 R. 790; Thomas, 12 R. 651). The Russian East Asiatic Company joined the combination in September (1 R. 283-287; 406, Minute 92). Thereupon the fighting ship arrangement temporarily fell into disuse.

In February, 1909, however, the New York and Continental Line, having undergone reorganization, reentered the field as the Northwest Transport Company (Thomas, 12 R. 650-651; Fourman, 11 R. 567-568; Richard, 12 R. 790). At once the fighting ship arrangement was revived by Atlantic Conference By-Law 104 (5 R. 2307, 2344). It has been in continuous operation ever since, first against the Northwest Transport Company, which in turn was

driven out of business in April, 1910, and later against its successor, the Uranium Line (Fourman, 11 R. 569-570). Indeed, fighting ships were constantly sent against the Uranium Line while the testimony in this case was being taken (Fourman, 11 R. 571; Nyland, 11 R. 503).

With reference to this fighting ship arrangement Mr. Ismay, President of the International Mercantile Marine Company, testified (12 R. 1023):

Q. The consequence of that situation was, in a word, to prevent other competition, was it not?

A. Yes.

**2. BOYCOTTING AGENTS WHO SELL TICKETS FOR INDEPENDENT LINES.**

The same meeting of the Atlantic Conference which adopted the fighting ship arrangement, also resolved upon a further measure against competitors, namely, the strict enforcement of so-called Conference Rule 9 (5 R. 2285, par. 4), which reads as follows:

Agents are prohibited from booking passengers for any steamer except those of the Lines, Members of the Continental, the Mediterranean and the North-Atlantic Passenger Conferences unless Conference gives express permission in writing \* \* \*. (1 R. 219; 1 R. 229.)

There is no dispute that the American Atlantic Conference has enforced and continues to enforce this rule by money penalties or by disqualification (Rule 15, 1 R. 221; Sandford, 11 R. 311, 338, 359; Ismay, 12 R. 1023; Cauty, 12 R. 1056; Winter, 13 R.



1743-1746; Peters' cablegram, 5 R. 2312, m. 25; Minutes of Am. Atl. Conference, 1 R. 401, m. 58, 59; 1 R. 403, m. 70; 1 R. 390, m. 4; 1 R. 391-393). Agents are required to report violations of Rule 9 by other agents (1 R. 221, Rule 16). Detectives are sometimes employed for the same purpose (1 R. 399, m. 44). An "eligible list" of agents is maintained, and those whose names are stricken therefrom are for all practical purposes blacklisted (1 R. 392, m. 10; 1 R. 431-432, Govt. Ex. 82).

An agent serving all the lines in the combination could do a profitable business. The business of the independent lines, on the other hand, was so small that it would not pay an agent to work for them alone (Peters' letter, 7 R. 3347; Nyland, 11 R. 513; Winter, 13 R. 1743, 1748). Consequently the boycott rendered it almost impossible for the independent lines to secure desirable agents.

Thus, while the Russian East Asiatic Company remained an outside line, all of the lines in the combination canceled their booking arrangements with A. E. Johnson & Co., its general agents (1 R. 390, m. 4; 1 R. 403, m. 70). The defendant Straus, a member of that firm, admitted that the difficulty met by the Russian East Asiatic Company in securing agents was one of the chief reasons which induced it to join the combination (Straus, 12 R. 765-766).

Similarly Richard, formerly general agent for the Russian Volunteer Fleet, the New York & Continental Line, and its successor the Northwest Transport

Company, testified that he considered the enforcement of Rule 9 the greatest obstacle these independent lines encountered (12 R. 792, 794). He offered to raise his rates and follow the other rules of the combination if they would stop enforcing Rule 9 against him, but without success (12 R. 814, 827). Substantially his entire force of 1,200 trained sub-agents was taken away and in the end he, too, was forced to go over to the combination—the Conference Lines (Richard, 12 R. 802, 817; 12 R. 792–793; 1 R. 307; Fourman, 11 R. 563, 570). Though now a Conference agent, he testified that the enforcement of Rule 9 tended to put out of business any line not party to the combination and tended to prevent the establishment of new competitors (12 R. 918, 919).

**3. REQUIRING RAILROADS TO DISCRIMINATE AGAINST INDEPENDENT LINES IN THE PAYMENT OF "COMMERCIAL ALLOWANCES."**

Steerage passengers as a rule are uneducated and comparatively helpless. Not 1 per cent are informed as to what railroad will take them to their destination. They make no inquiry and apparently have no interest in how they shall be routed (McCain, 12 R. 848, 849; Kerr, 13 R. 1611). Consequently the defendant steamship companies have the power, if they desire to exercise it, to direct this traffic over any railroad route they choose (4 R. 1818). They have jointly exercised this power to compel the railroads to pay them for each steerage passenger delivered, eastbound or westbound, a "commercial allowance," so-called, amounting to



10 per cent of the entire railroad fare paid by such passenger.<sup>1</sup>

Furthermore, they have exacted from the railroads an agreement not to pay any similar "allowances" to independent lines (1 R. 360; 1 R. 376, Art. III). Pursuant to this agreement the railroads refused to pay allowances to the Northwest Transport Company (3 R. 1097), and still refuse them to its successor, the Uranium Line, except as to part of the westbound traffic (Fourman, 11 R. 586-588).<sup>2</sup>

#### EFFECT OF UNFAIR COMPETITIVE METHODS.

##### 1. AGAINST THE RUSSIAN VOLUNTEER FLEET.

Shortly after the Russian-Japanese War the Russian Volunteer Fleet, which theretofore had operated between Odessa and Vladivostock, started a direct line from Libau on the Baltic to New York City, touching en route at Rotterdam (Richard, 12 R. 791). It hoped to develop Libau as a port and to attract a portion of the Russian trade, then carried by way of Germany, no direct line between Russia and the United States having theretofore existed

<sup>1</sup> No allowance is paid where the railroad fare is less than \$2.50 (McCain, 12 R. 845-846, 874, 878), and the maximum allowance is fixed at \$4 per passenger (Sandford, 11 R. 420; 1 R. 369). No allowances whatever are paid in the case of first-class or second-class passengers, these being too intelligent to be controlled by the steamship company (McCain, 12 R. 846, 878-879). No allowances are paid on *eastbound* steerage passengers originating in trunk-line territory, the zone bordering the Atlantic (Sandford, 11 R. 417), presumably because such traffic can not be satisfactorily apportioned. European railroads, being government-owned, pay no commercial allowances at all (Straus, 12 R. 789).

<sup>2</sup> The Russian East Asiatic Company received partial allowances from some of the weaker lines (not from the "standard lines") while not a member of the combination, but this was before the express contract with railroads in that territory (Straus, 12 R. 782-787).

(Fourman, 11 R. 552-533). Its boats were fast, good, and especially fitted for the North Atlantic steerage traffic—indeed, they were much superior to the boats of the Russian East Asiatic Steamship Company subsequently opposed to them by the combination (Fourman, 11 R. 621, 551, fol. 1653; Richard, 12 R. 791, 818, 820; Gips, 1 R. 485).

Even before its ships began to run, however, the combination had planned its ruin (1 R. 487-488). The Russian East Asiatic Steamship Company, which had never theretofore been engaged in the Libau-New York trade, was set up as a competitor of the Russian Volunteer Fleet with steamers furnished by members of the combination (Nyland, 11 R. 524, 527; Fourman, 11 R. 553).

A bitter and relentless struggle ensued. "Fighting steamers" were sent against the Volunteer Fleet at rates admittedly so low that losses necessarily resulted (Ans., 11 R. 137, 155, 174). The losses of the "fighting steamers" were borne at first by the N. D. L. V. Lines alone, and after the formation of the General Pool Agreement, by all the parties thereto (11 R. 487-488; Fourman, 11 R. 553, 559-561; Richard, 12 R. 802).

The agents of the Volunteer Fleet were taken away by the boycott declared against them by the combination—the Conference Lines (Richard, 12 R. 792-793, 794-795). Conference agents made misrepresentations as to its service, stating that its ships were unseaworthy, that they had been shot full of cannon balls and were liable to sink at any time, that they

required 17 to 20 days in passage, that the food was unfit to eat and the accommodations "not fit to send a dog by" (Letter Feb. 28, 1907, 1 R. 208; Fourman, 11 R. 565-566; Richard, 12 R. 796-797).

Richard, general agent of the Volunteer Fleet, repeatedly protested against this treatment, but without avail (1 R. 208-209; Sandford, 11 R. 431-433; Richard, 12 R. 796). In July, 1908, the Volunteer Fleet was driven out of the trans-Atlantic business (Straus, 12 R. 765; Richard, 12 R. 812, 819, 939; Winter, 13 R. 1758, 1760).<sup>1</sup>

#### 2. AGAINST THE RUSSIAN EAST ASIATIC STEAMSHIP COMPANY.

This company, originally set up by the defendants as a competitor of the Russian Volunteer Fleet, withdrew from the combination December 27, 1906 (1 R. 504-505), and thereafter suffered equally with the Volunteer Fleet from the unfair competition of the combination. Its steamers were opposed by fighting ships furnished by members of the combination (Straus, 12 R. 742; letter canceling order for fighting ship when R. E. A. rejoined conference, 1 R. 286), and its agents were boycotted (Straus, 12 R. 765-

<sup>1</sup> To show that the Russian Volunteer Fleet was not driven out by the unfair competition of the pool lines, defendants introduced a letter from A. Radloff, now president of that company. This document, a mere letter to the editor of a newspaper, was written January 25, 1911, *after this suit had been brought* (12 R. 820). Furthermore, Radloff was not president of the Volunteer Fleet in 1908, when that line went out of the Atlantic business, and this statement, *post litem motam*, is directly contrary to the contemporaneous statement of the *then* president to Mr. Richard, the *then* general agent of the company, and also contrary to the contemporaneous statement of the *then* general manager at Libau to Mr. Fourman, an employee in Mr. Richard's office (Richard, 12 R. 818-819, 939; Straus, 12 R. 765; Winter, 13 R. 1758, 1760).

766; 1 R. 390; 1 R. 403 m. 70). Its operations resulted in financial loss (Ans., 11 R. 261). Ultimately it was forced to rejoin the combination, being admitted into the General Pool Agreement under Agreement BB, September 1, 1908, and receiving a fixed percentage of the North Atlantic traffic (Ans., 11 R. 150, 168; Sandford, 11 R. 357-358; 1 R. 406, 285-286, 287, 461; Lister, 12 R. 1535; 6 R. 1766-1772; 5 R. 2682).

**3. AGAINST THE NEW YORK AND CONTINENTAL LINE-NORTHWEST TRANSPORT COMPANY-URANIUM LINE.**

The New York and Continental Line, subsequently reorganized as the Northwest Transport Line and still later as the Uranium Line, originally operated a freight service consisting of 17 ships (Thomas, 12 R. 642-646). In April, 1908, it began to carry passengers as well as freight between New York and Rotterdam (Richard, 12 R. 790). It immediately suffered severe losses from the unfair competition of the combination. Its rates were undercut by fighting ships and its agents boycotted (Richard, 12 R. 794-795; Thomas, 13 R. 1702; 4 R. 2116, 2148; 7 R. 3335). From the start the New York and Continental Line was a losing proposition and in August, 1908, after only seven passenger carrying trips, it was driven out of business (Thomas, 12 R. 647, 649, 673; Richard, 12 R. 790).

The Northwest Transport Company, a reorganization of the New York and Continental Line, reentered the New York and Rotterdam freight and passenger trade with six ships February 27, 1909,

and continued until May 7, 1910 (Thomas, 12 R. 650, 651, 673). The same practices which had been employed against its predecessor were employed with equal success against the Northwest Transport Company (5 R. 2307; Fourman, 11 R. 567-569). It continually lost money and its principal backers finally chartered its three remaining vessels themselves and turned them over to a new company, the Uranium Line, which continued in the same trade (Fourman, 11 R. 609; Thomas, 12 R. 651, 673).

The unfair practices continued and still continue (Nyland, 11 R. 523; Fourman, 11 R. 570-574, 576; Thomas, 13 R. 1702; 12 R. 676). Fighting steamers, both westbound and eastbound, are employed against the Uranium Line (Thomas, 12 R. 685; 13 R. 1702; Nyland, 11 R. 503). Its agents are still boycotted and the railroads refuse to pay it commercial allowances (Fourman, 11 R. 570, 586-587; 3 R. 1097). While it has made some profit recently, nevertheless its operations taken as a whole have been unprofitable and its liabilities far exceed its assets (Thomas, 13 R. 1700, 1702, 1712-1713). In fact it is only saved from insolvency by the fact that certain of its stockholders possessing large resources are willing to guarantee its obligations (Thomas, 13 R. 1698, 1715-1716).

#### THE PRESENT STATUS.

At the time this suit was filed only a single independent, the Uranium Line, remained in all the North Atlantic steorage trade (Thomas, 13 R. 1703; Winter, 12 R. 1192; 13 R. 1420-1421).

The overwhelming proportion of the steerage trade controlled by the members of the combination in the calendar year 1911, is shown by the following figures taken from Government Exhibit 159 (2 R. 948):

*Steerage passengers carried in 1911 between the United States and British or Continental European ports north of Cadiz, Spain, with percentages.*

	Number of passengers carried.			Per cent of total.
	West-bound.	East-bound.	Total.	
Atlantic Conference Lines (members of the combination) <sup>a</sup> .....	612, 624	333, 360	945, 984	97. 39
Uranium Line (the only independent).....	12, 027	13, 286	25, 313	2. 61
All lines <sup>c</sup> .....	624, 651	346, 646	971, 297	100. 00

<sup>a</sup> 2 R. 955, 956.

<sup>b</sup> 2 R. 1035.

<sup>c</sup> The carryings to and from Mediterranean ports—344,263 passengers (2 R. 957)—are not included because under the terms of the Mediterranean agreement, *supra* p. 11-12, the trade is parceled out, the Mediterranean Lines withdrawing from competition for North Atlantic business and the North Atlantic Lines withdrawing from competition for Mediterranean business.

Reference should be made at this point to the alleged withdrawal of three of the defendants from the combination.

The Allan Line, the Canadian Pacific Railway Company, and the Russian East Asiatic Company maintained in their briefs below that they had withdrawn from Agreement AA prior to the filing of the present suit. The two former also claimed to have withdrawn from the fighting ship arrangement by a special notice to that effect. The Russian East Asiatic Company made no claim as to the

fighting ship arrangement other than its general claim of withdrawal from Agreement AA.

The District Court found that the Allan Line and the Canadian Pacific Railway Company had in fact withdrawn from the fighting ship arrangement and exempted them from the decree enjoining that arrangement (10 R. 5133, 5138). Since the petition was dismissed absolutely as to all other charges, it was unnecessary for the court to pass upon their wider claim as to withdrawal from Agreement AA, and it did not do so.

Impliedly, though not expressly, the District Court seems to have held that the Russian East Asiatic Company had not withdrawn from the combination, for it included that company in the decree against fighting ships (10 R. 5138). The Russian East Asiatic Company has not appealed from this decree except, as hereafter shown, on jurisdictional grounds. It may, however, renew its claim to exemption from the wider decree requested by the Government.

The facts as to the alleged withdrawals are as follows:

Agreement AA was entered into February 5, 1908, effective March 1, 1908, to continue until February 28, 1911, and thereafter from year to year unless due notice should be given to the Secretary not later than December 1, 1910 (1 R. 73, art. 27). Between November 28, 1910, and December 1, 1910, a number of lines notified the Secretary of their intention



to withdraw. Among them were the Allan Line,<sup>1</sup> the Canadian Pacific Railway Company,<sup>1</sup> and the Russian East Asiatic Company (9 R. 4873~~4874~~, -4885).

These notices were not to take effect immediately, however. Under Article 27 of Agreement AA (1 R. 73) it was impossible to withdraw from that agreement prior to February 28, 1911, and the notices above referred to expressly stated that they were not to be effective until that date. The petition in this case was filed January 4, 1911 (11 R. 147, 165, 204). On defendants' own showing, therefore, the petition was filed almost two months before any of the members had actually withdrawn.

In accordance with the opinion of this Court in the *Trans-Missouri Freight Association Case*, 166 U. S. 290, 308 (see also *So. Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Boise City I. & L. Co. v. Clark*, 131 Fed. 415, C. C. A. 9th), the Government is entitled, of course, to a decree as of the date of the filing of the petition—especially in view of the fact that none of the lines admit the illegality of the agreement but on the contrary stoutly aver its propriety and necessity, and also in view of the further fact that the defendants' own witness, Kerr, admitted (3 R. 1594) that the withdrawal of the Canadian Pacific Railway was in contemplation

<sup>1</sup> This notice was entirely distinct from the notice of withdrawal from the fighting ship arrangement. The Allan Line gave notice of its intention to withdraw from the fighting ship arrangement December 16, 1908, and did actually withdraw January 17, 1909 (Ans. Allan Line, 11 R. 154; Hannah, 13 R. 1434). The Canadian Pacific Railway Company gave notice of withdrawal from the fighting ship arrangement June 15, 1910, which notice became effective July 15, 1910 (Ans. C. P. R. Co., 11 R. 213; Kerr, 13 R. 1603-1604).

of the impending action of the United States Government.<sup>1</sup>

<sup>1</sup> It may be doubted, however, whether there was in fact any bona fide withdrawal. The burden rests on the defendants to show it, and the burden has not been sustained. Ismay, President of the International Mercantile Marine, which company it will be remembered also gave notice of withdrawal, testified as follows (12 R. 1031):

"Q. In December, 1910, the various members of the conference had some trouble with one another as to whether Agreement 'AA' should continue to exist or not, or November, 1910?

A. Do you know what the circumstances were?

Q. I will show you a letter. See if that refreshes your recollection. (Letter read to Mr. Ismay and examined.)

A. Yes, I must have been present.

Q. And any troubles that arose at that time were—?

A. They were patched up.

Q. Were settled up, so that the conference is just as strong as ever.

Mr. CRIM: When was that?

Mr. GUILER: December 3rd, 1910.

Mr. ISMAY: We renewed the agreement for five years, I think.

Ismay further testified that Agreement Z, under which the Allan Line, the Donaldson Line and the Dominion Line were admitted to the combination (5 R. 2667), is still in effect, saying (12 R. 1041):

Q. Is that arrangement in effect today?

A. Still in force, but the percentage is altered.

Q. Do these three lines, the Allan, the Dominion and the Donaldson's receive more or less?

A. The Allan and Donaldson's both get more. I am satisfied that the Allan get more and Donaldson's get a little bit more. The Dominion has not been increased.

Similarly, Hannah, passenger manager of the Allan Line, a witness for the defendants, testified positively that the Allan Line is still a member of the combination, saying (13 R. 1455):

Q. And up to date you are a member of Agreement AA, one of the members signatory of Agreement AA and have continued to be a member under that agreement of the Atlantic Conference?

A. Yes, sir.

Q. And your line has?

A. Yes, sir.

Q. And is a member of it today?

A. Yes, sir.

Ismay also testified that Agreement BB, under which the Russian East Asiatic Company was admitted to the combination is still in effect, saying (12 R. 1041-1042):

Q. Now BB?

A. I have it here.

Q. Is that in effect today?

A. Yes, it is in effect today with certain amendments.

Q. Do you recall briefly what the amendments are?

A. I do not know. I have never been present, but I am told that we doubled the percentage.

Q. In other respects it is in effect today?

A. Yes, we doubled the percentage to the Russian East Asiatic Company east and west, otherwise it is the same.

The shifting and contradictory testimony of the defendant Straus, general passenger agent of the Russian East Asiatic Company, corroborates rather

## SUBSTANCE OF THE DEFENSE.

The defendants admit that the terms of the General Pool Agreement and the agreements collateral thereto are being faithfully observed. They admit also, in substance, the use of fighting ships, the

than disproves Ismay's categorical statement. On direct examination by Government counsel, Straus testified (12 R. 736):

Q. Is it [the Russian East Asiatic Co.] a member of the North-Atlantic Conference?

A. I don't think so.

Q. Continental Conference?

A. No, sir.

Q. Of any conference?

A. No, sir, except in New York, if that is what you mean.

Q. Is it a member of the North-Atlantic Conference?

A. Oh, yes.

Q. Is it?

A. Yes, New York.

Q. Do you recall the date when you joined or rejoined, as the fact may be, the Continental Conference; does this refresh your recollection, if you do not (handing witness paper)?

A. Yes, I do recall that.

Q. That was September, 1908, was it not?

A. Yes. (739).

Q. Do you mean to say that there is no agreement by which the Russian East Asiatic Steamship Company, Limited, secured a certain pro rata share of the steerage passenger business of the North Atlantic?

A. No, sir; all I know is that we pay a pro rata to the Conference in order to maintain it.

Q. You pay a pro rata share?

A. Yes.

Q. State just what you mean?

A. For instance, it takes probably fifteen or twenty thousand dollars a year to run a Conference and our share is probably five hundred dollars or six hundred dollars a year; we pay our share towards the payment of Sandford's salary, or the official salaries of those there.

Q. Do you mean to say there is no agreement between the Russian East Asiatic Steamship Company, Limited; no agreement since September, 1908, by which the Russian East Asiatic Company, Limited, is allowed a certain pro rata share of the steerage passenger business of the North Atlantic?

A. What they are allowed I don't know; they may be allowed a percentage, but what that percentage is, I don't know anything about it.

Q. What is your best information; that they are allowed a percentage, is it not?

A. I believe they are.

Q. What are the sources of that belief or that information?

A. I suppose one has to have a certain amount of imagination. They know there must be some percentage, but what that percentage is, I don't know. (742-743.)

boycotting of agents of independent lines and the agreements requiring railroads to refuse allowances to independent lines. In justification they urge (1) the alleged beneficial results of the combination in stabilizing the business and averting ruinous com-

Cross examination by counsel for the Russian East Asiatic Company:

Q. In 1908 you were informed, I understand, by cable that you were admitted to a conference?

A. Yes, sir. \* \* \*

Q. Since that time I assume you have been informed that you are out of the conference?

A. Yes, sir.

Q. I understand your information was that some time in September you entered the conference and got out of it some time in February, 1911?

A. I received that information from you. (752)

Re-direct examination by Government counsel:

Q. Now, Mr. Straus, with regard to this conference, you regard it as something of great advantage to your line, do you not?

A. I think so.

Q. Why did you leave?

A. I never left it.

Q. When did your line leave it?

A. I wasn't the passenger agent of the line when you said they left it.

Q. Are you in it now?

A. Yes, sir.

Q. You are in the conference now?

A. Yes, sir; in New York. (776-777).

After recess, Mr. Straus was recalled by counsel for the Russian East Asiatic Company and testified as follows:

Q. As I understand, your most recent information is that your company is not a member of the conference?

A. That is my information, that they are not a member of the conference. (898)

This testimony was all given July 1 and 2, 1912, and if, as defendants contend, the Russian East Asiatic Company had in good faith withdrawn from the combination in December, 1910, over a year and a half before, it is inconceivable that their general passenger agent in the United States would never have heard of it until informed by counsel just before he testified (12 R. 745, 751, 752, 777).

The fighting ship compensation account rendered December 30, 1910, (the last the record contains), rendered only 5 days before this petition was filed, shows that the Russian East Asiatic Company was still sharing the expense of operating the fighting ships (9 R. 4923, 4925).

And finally, if there was in fact a bona fide withdrawal from the combination, would the Russian East Asiatic Company and the Allan Line have failed, as they did fail, even to mention it in their answers? Indeed the answers of practically all the defendants, responding to the allegations

petition, and (2) the alleged fact that the rates charged by the combination have not been unreasonable. They also argue that Congress had neither (1) the power nor (2) the intention to make trans-Atlantic steamship lines amenable to the provisions of the Anti-Trust Act.

#### DECREE OF DISTRICT COURT.

The District Court, while holding the Anti-Trust Act applicable to ocean carriers engaged in the foreign commerce of the United States (10 R. 5123), and while finding that—

It is practically not disputed that, by the various agreements and conferences which together constitute the combination complained of, that branch of trans-Atlantic commerce which is concerned with the transport of steerage passengers is arbitrarily interfered with so that the proportions of it carried by the various lines, which have so combined, are not as they would be if full, free and unrestricted competition were the sole controlling power to effect the distribution (10 R. 5127, 5128);

further held that—

in view of the peculiarities of ocean transportation, the method adopted by the defend-

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of section B of the petition (1 R. 24), expressly admit that the Russian East Asiatic Line is still party to the combination either under Agreement AA or some equivalent arrangement (see, for example, Ans. Allan Line, 1 R. 157; Ans. Hamburg-American Line, 1 R. 175; Ans. Cunard Line, 1 R. 234).

We submit, therefore, that there has been no bona fide withdrawal on the part of either the Allan Line, the Canadian Pacific Railway Company, or the Russian East Asiatic Company.

ants—if purged of its obnoxious feature, the “fighting ships”—is a reasonable one, which so far from restraining trade really fosters and protects it by giving it a stability which insures more satisfactory public service for all concerned (10 R. 5133).

It therefore dismissed the bill except as to the use of fighting ships—a subordinate feature of the case. That practice it enjoined, though inadequately, as the Government maintains.

#### ASSIGNMENTS OF ERROR.

Broadly speaking, the assignments of error come to this—

First, on the part of the United States, that the court erred in not adjudging the combination above described to be in restraint of trade and commerce and a monopolization of a part thereof in violation of the Anti-Trust Act, and in not preventing its continued operation (10 R. 5144-5163).

Second, on the part of the defendants, that the court erred in not holding that the transportation carried on by the defendant steamship lines is beyond the purview of the Anti-Trust Act “for the reason that the Congress did not intend said Act to apply to international commerce” (14 R. 4-5), and in not dismissing the bill on that ground.

Two general questions are thus presented by the assignments of error—

First. Is the Anti-Trust Act applicable to combinations affecting ocean transportation between ports

of the United States and foreign ports; i. e., is it within the *power* of Congress to legislate in respect of such combinations, and did it *intend* by the Anti-Trust Act to do so?

Second. If the Act is applicable, is a combination of trans-Atlantic steamship lines to suppress competition in transportation eastbound and westbound between ports of the United States and foreign ports by pooling the traffic, fixing rates and wrongfully excluding other lines from the business a combination in restraint of trade or a monopolization thereof?



## THE ARGUMENT.

### OUTLINE.

I. The Anti-Trust Act is applicable to ocean transportation between ports of the United States and foreign ports.

II. The Anti-Trust Act being applicable to ocean transportation between ports of the United States and foreign ports, a combination to restrain or monopolize such commerce cannot escape because formed in a foreign country and composed of foreign corporations, if, as here, the combination is operative within the territorial limits of the United States.

III. Defendant steamship lines are parties to a combination and conspiracy to pool traffic in steerage passengers between ports of the United States and foreign ports and to fix the rates of passage, thereby restraining foreign commerce in violation of the Anti-Trust Act.

IV. The combination and conspiracy by unfair and oppressive methods of competition also prevents other lines from engaging in the transportation of steerage passengers between ports of the United States and foreign ports, thereby further restraining foreign commerce in violation of the Anti-Trust Act.

V. The alleged good done by the combination in stabilizing the business is no defense.

VI. The fact, if it be a fact, that the rates charged by members of the combination have been reasonable is no defense.

VII. The reasoning of the District Court considered.

VIII. Concerning the remedy.

# I.

## THE ANTI-TRUST ACT IS APPLICABLE TO OCEAN TRANSPORTATION BETWEEN PORTS OF THE UNITED STATES AND FOREIGN PORTS.

### 1. AS TO THE POWER OF CONGRESS.

The transportation of persons and property by water, for hire, is commerce within the meaning of the Constitution, and when between this country and foreign nations it is foreign commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 189-191, 215; *The Passenger Cases*, 7 How. 283, 401.

Except as limited by the Constitution itself, Congress has all the powers of sovereignty in respect of the regulation of foreign commerce. As said by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 196:

This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.

The regulations imposed by the Anti-Trust Act are within the limits prescribed by the Constitution. *United States v. Joint Traffic Ass'n*, 171 U. S. 505;

*Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Northern Securities Co. v. United States*, 193 U. S. 197.

It follows of course that it was within the power of Congress to make the provisions of the Anti-Trust Act applicable to the transportation of persons and property between ports of the United States and foreign ports.

#### 2. AS TO THE INTENT OF CONGRESS.

It is equally clear that Congress intended to do so. The contention of defendants to the contrary—"that the Congress did not intend said Act to apply to international commerce" (Assignments of Error on Cross Appeal, 14 R., 4)—is directly opposed to the language of the Act, which prohibits every combination or conspiracy to restrain or monopolize—

commerce among the several States, or with foreign nations (26 Stat. 209, c. 647).

The commerce committed by the Constitution to the control of Congress is—

commerce with foreign nations, and among the several States, and with the Indian Tribes (Art. 1, Sec. 8).

Leaving out of consideration commerce with the Indian Tribes, which is not involved, it will be observed that the commerce to which the Anti-Trust Act applies is defined by the Act itself in the very words employed in the Constitution to define the commerce over which the power of Congress extends—"commerce with foreign nations" and "commerce among the several States".

The Anti-Trust Act being an exercise of the power to regulate commerce conferred by the Constitution, in thus defining the commerce to which that Act applies in the same terms in which the Constitution defines the commerce to which the power of the Federal Government extends, it must be presumed, in the entire absence of evidence to the contrary, that Congress intended these terms to have the same scope in the Anti-Trust Act that they have in the Constitution. What that scope is, so far as foreign commerce is concerned, with which alone we are now concerned, was thus stated by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 193:

It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

The question whether the Anti-Trust Act applies to transportation by railroad was raised shortly after the passage of the Act. This Court held that it does (*United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290; *United States v. Joint Traffic Ass'n*, 171 U. S. 505), saying (166 U. S. 324-325):

Congress has, so far as its jurisdiction extends, prohibited all contracts or combinations in the form of trusts entered into for the

purpose of restraining trade and commerce. The results naturally flowing from a contract or combination in restraint of trade or commerce, when entered into by a manufacturing or trading company such as above stated, while differing somewhat from those which may follow a contract to keep up transportation rates by railroads, are nevertheless of the same nature and kind, and the contracts themselves do not so far differ in their nature that they may not all be treated alike and be condemned in common. It is entirely appropriate generally to subject corporations or persons engaged in trading or manufacturing to different rules from those applicable to railroads in their transportation business; but when the evil to be remedied is similar in both kinds of corporations, such as contracts which are unquestionably in restraint of trade, we see no reason why similar rules should not be promulgated in regard to both, and both be covered in the same statute by general language sufficiently broad to include them both. We see nothing either in contemporaneous history, in the legal situation at the time of the passage of the statute, in its legislative history, or in any general difference in the nature or kind of these trading or manufacturing companies from railroad companies, which would lead us to the conclusion that it can not be supposed the legislature in prohibiting the making of contracts in restraint of trade intended to include railroads within the purview of that act.

Neither is the statute, in our judgment, so uncertain in its meaning, or its language so vague, that it ought not to be held applicable to railroads. It prohibits contracts, combinations, etc., in restraint of trade or commerce. Transporting commodities is commerce, and if from one State to or through another it is interstate commerce. To be reached by the Federal statute it must be commerce among the several States or with foreign nations. When the act prohibits contracts in restraint of trade or commerce, the plain meaning of the language used includes contracts which relate to either or both subjects. Both trade and commerce are included so long as each relates to that which is interstate or foreign. Transportation of commodities among the several States *or with foreign nations* falls within the description of the words of the statute with regard to that subject. [Italics ours.]

Necessarily this reasoning also brings within the operation of the Act transportation by water, whether between points within the United States or between the United States and foreign countries.

Furthermore, in *United States v. Pacific & Arctic Co.*, 228 U. S. 87, this Court directly held that the Anti-Trust Act applies to ocean transportation. In that case the defendant railroad companies were held guilty of attempting to create a monopoly, not of railroad transportation but of transportation by water between Vancouver, British Columbia; Seattle, Washington; and Skagway, Alaska.

The same conclusion seems to have been reached in *United States v. Union Pacific R. Co.*, 226 U. S. 61. In that case the Government challenged the combination of the Union Pacific and the Southern Pacific because of its effect on competition not only as to land transportation, but also as to water transportation, and particularly as to their respective lines of ocean steamers theretofore competing for the Oriental trade (Petition, pp. 7, 9; Govt. Br., p. 92; Opinion, 221 U. S. at 80-81). While of course the restriction of water competition was not the principal feature of the case, nevertheless this Court recognized it as one of the illegal elements, saying (p. 93):

Conceding for this purpose that it might have been legitimate, had it been practicable, to acquire the California connection at Ogden over the old Central Pacific line, we must consider what was in fact done, and that was the purchase of the controlling interest in the entire Southern Pacific system, *consisting of ocean and river lines with a mileage of about 3,500 miles and railroad lines aggregating over 8,000 miles, together forming a transportation system from New York and other Atlantic ports to San Francisco and Portland and other Pacific coast points, with various branches and connections, besides a steamship line from San Francisco to the Orient and a half interest in another line between the two latter points.* [Italics ours.]

Again, in *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, the applicability of the Act to water lines was



assumed, otherwise it would have been unnecessary to decide the case upon the merits.

The United States circuit judges of the Second Circuit have three times applied the Act to ocean transportation. *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251; *United States v. Hamburg American Line*, 200 Fed. 806; *United States v. Prince Line*, 220 Fed. 230.

Transportation on the Great Lakes has also been held within the Act both by the circuit judges of the Sixth Circuit and by the Supreme Court of Michigan. *United States v. Great Lakes Towing Co.*, 208 Fed. 733; *Cole Transportation Co. v. White Star Line*, 186 Fed. 63; *White Star Line v. Star Line Steamers*, 141 Mich. 604, 611.

Nor was any distinction ever taken at common law between water transportation and other forms of business with respect to contracts and combinations in restraint of trade. *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 70; *Anderson v. Jett*, 89 Ky. 375; *Stanton v. Allen*, 5 Denio (N. Y.) 434; *Hooker v. Vandewater*, 4 Denio (N. Y.) 349; *Watson v. Harlem, etc., Nav. Co.*, 52 How. Pr. (N. Y.) 348.

The question as to the application of the Anti-Trust Act to ocean transportation has thus already been decided. Supposing it were open, however, there is no ground for assuming that when Congress used in that Act the words "commerce with foreign nations" it did not intend to include the most distinctive kind of "commerce with foreign nations"—

transportation between ports of the United States and foreign ports.

It is an easy thing to say that the letter of a statute is contrary to its spirit, etc., and therefore must be rewritten by the Court. The language of a statute, however, must always be accepted as the best guide to the legislative intent. As stated by this Court, speaking through Mr. Justice Brewer, in *United States v. Goldenberg*, 168 U. S. 95, 102:

The primary and general rule of statutory construction is that the intent of the law-maker is to be found in the language that he has used.

We embark upon a sea of speculation when we substitute what Congress is presumed to have intended for what Congress actually said.

The principle—

that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 459)—

is applicable only in those rare and extreme cases where to follow the written words would produce a result so amazing, so irrational, so unconnected in any possible way with the evils at which the Act was aimed, that the inference that Congress intended something different would be irresistible among reasonable men. *United States v. Goldenberg*, 168 U. S. 95, 102, 103.

We have no such case here. There is nothing absurd or irrational in applying to combinations of

steamship lines—trans-ocean, lake or coastwise—the same rules against monopoly that apply to all other branches of industry. There is no ground for claiming that monopoly of water transportation is so different from monopoly generally that its prohibition has no possible relation to the evils at which the Anti-Trust Act was aimed.

Indeed there is greater reason for holding the Act applicable to ocean carriers than to railroads, since Congress by separate enactment had already provided in respect of railroads a complete system of governmental control and regulation with power to prevent excessive or discriminatory rates and unfair or discriminatory practices. As regards ocean carriers, however, there is no such control, and if they are not subject to the Anti-Trust Act they are free to conspire to exact whatever rates their cupidity may dictate and to destroy any competitor who may be inclined to act independently.

It is insinuated that permitting combination between steamship lines would somehow tend to build up an American merchant marine. Waiving the irrelevancy of the point, how could it, when these defendants are already combined for the very purpose and with sufficient power to destroy all new competitors—the Government (*ex hypothesi*) being impotent to prevent their doing so?

Again, it is said that to apply the Anti-Trust Act to ocean transportation might result in foreign complications. But *unregulated* monopoly would not be

tolerated. And would not foreign complications be far more likely to ensue from any attempt to apply an effective system of positive regulation than from a mere prohibition against undue restriction of competition? Whatever foreign countries may *permit*, we are not aware that any of them *require* combinations of steamship lines.

The Act to Regulate Commerce, it is true, has been held inapplicable to trans-Atlantic steamship lines, but for reasons entirely inapplicable here, namely (1) the legislative history of the Act, which shows that *railroad* regulation was its primary object, (2) internal evidence in the Act itself, particularly in section 1, and (3) the manifest impossibility of applying to trans-ocean carriers its requirements as to filing rates and adhering thereto. These reasons are stated in *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.*, 13 I. C. C. 266, 281-282, the only case in which this point has been squarely raised and fully discussed. Commissioner Lane there said:

*The Act to regulate commerce arose out of the unjust and discriminatory practices of the rail lines; and all other carriers, when entirely independent thereof, were exempted from the restrictions imposed by this act and denied its benefits. Indeed, it may be said that the primary purpose of the law, judging from the reports and debates of Congress prior to and succeeding the enactment of the act of 1887, was to regulate rail carriers. (270)*

\* \* \* \* \*

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The jurisdiction of this Commission is not to be determined by anything other than the language of Section 1 of the act, and *in this section we find a clear distinction drawn as between interstate commerce and foreign commerce to a country not adjacent to the United States; and this distinction, in our opinion, saves such foreign commerce from the effect of that provision of the section as to continuous carriage beyond the American seaboard.* (271)

\* \* \* \* \*

If it were the intention of Congress to give to this Commission jurisdiction over carriers by water engaged in the transportation of foreign commerce, it would be expected that such purpose would be manifested in other portions of the act and that adequate machinery for the enforcement of its provisions would be provided. \* \* \* If such was the intention it must be confessed that Congress succeeded in presenting a piece of legislation to the world which is of singular and distinguished incompleteness. (274, 276-277.)

\* \* \* \* \*

*There is not to-day, and never has been, such a thing as stability of rates upon the water.* Perhaps it is not desirable that there should be. The ocean is a highway free to all. No franchise is needed to sail the seas, nor is the establishment of a line of ships founded, either in law or in economics, upon the theory of a public-serving monopoly which underlies the relation of the railroad to the State. It may well be, therefore, that *without regulation, and by reason of natural competitive con-*

*ditions, the public will be best served, and in the end treated more equitably, by leaving the water carriers to foreign lands entirely unhampered by legal restrictions such as the people of this and other lands have found it necessary to impose upon the railroads. Under the ruling here made the fluctuation in the total through rate charged from an inland point in the United States to a European or Asiatic country will fall where in fact the fluctuation is, at the seaboard. The competition in rates will thus manifest itself where the competition really exists, and where the law presumes it will unrestrictedly continue, viz, where the ships bid against each other for cargo. (281-282.) [Italics ours.]*<sup>1</sup>

Similarly, Mr. Justice Harlan's dissenting opinion in the *Import Rate Case*, 162 U. S. 197, contains with regard to Section 1 of the Act to Regulate Commerce, the following statement, which is not in contravention of anything said by the majority of the Court (p. 245):

*From this section it is clear that the Texas and Pacific Railway Company is, and that the ocean lines connecting with that company are not, subject to the provisions of the act. [Italics ours.]*

In the case of the Anti-Trust Act, however, there is no impossibility, or even difficulty, in applying the Act to ocean carriers. Its language plainly includes them, and there is no legislative history

<sup>1</sup> As to the fluctuation of ocean rates see also *Armour Packing Co. v. United States*, 209 U. S. 56, 78, and the *Report of the Committee on Merchant Marine and Fisheries*, pp. 309-311, 420 (Doc. 805, 63d Cong., 2d Sess.).

from which to impute a narrower purpose than the unambiguous words convey.

We submit, therefore, that the decision of the Court below on this point was right. It said (10 R., 5124):

The prohibitions of the Anti-Trust Statute apply broadly to contracts in restraint of trade or commerce with foreign nations. This contract directly and materially affects such commerce, and if it unlawfully restrains it, it comes within the statute. We see nothing to warrant the contention that the act should be narrowly interpreted as prohibiting only contracts which are to be formed wholly within the territorial jurisdiction of the United States nor—if it were for us to consider—any reason for concluding that a broader construction would lead to international complications.

## II.

THE ANTI-TRUST ACT BEING APPLICABLE TO OCEAN TRANSPORTATION BETWEEN PORTS OF THE UNITED STATES AND FOREIGN PORTS, A COMBINATION TO RESTRAIN OR MONOPOLIZE SUCH COMMERCE CAN NOT ESCAPE BECAUSE FORMED IN A FOREIGN COUNTRY AND COMPOSED OF FOREIGN CORPORATIONS, IF, AS HERE, THE COMBINATION IS OPERATIVE WITHIN THE TERRITORIAL LIMITS OF THE UNITED STATES.

In the Court below the defendants maintained not only (1) that the Anti-Trust Act has no application to ocean transportation, but (2) that in any event combinations affecting such commerce are not within the Act when formed in a foreign country and composed of foreign corporations. Their assign-



ments of error, while still maintaining the first point (just discussed), make no mention of the second (14 R. 4). Since, however, the second may yet be renewed, we proceed now to consider it, discussing first the power of Congress to deal with such combinations, and second, its intent as expressed in the Anti-Trust Act.

#### 1. AS TO THE POWER OF CONGRESS.

What constitutional limitation is violated by Congress prescribing that our foreign commerce shall not be restrained or monopolized by foreign citizens any more than by our own citizens—that combinations and conspiracies like the present, operative within this country, intended to be operative here, and consummated by acts performed here, are illegal whether initiated here or abroad? Defendants point to none.

None but the “due process” clause of the Fifth Amendment—or, in criminal cases, the requirements as to trial in the State and district wherein the crime shall have been committed—could even conceivably apply.

It is elementary, however, that consistent with both these constitutional provisions, conspiracies—or for that matter, acts of any sort—may be dealt with by the law of the place in which they are *operative*, regardless of where they were initiated or of the citizenship of the parties. *Brown v. Elliott*, 225 U. S. 392, 401–402; *Hyde and Schneider v. United States*, 225 U. S. 347; *United States v. Nord Deutscher*

*Lloyd Co.*, 223 U. S. 512; *International Harvester Co. v. Missouri*, 234 U. S. 199; 237 Mo. 369; *Strassheim v. Daily*, 221 U. S. 280, 285; *Armour Packing Co. v. United States*, 209 U. S. 56, 76; *Hyde v. Shine*, 199 U. S. 62, 76; *Burton v. United States*, 202 U. S. 344; *In re Palliser*, 136 U. S. 257; *Rex v. Brisac*, 4 East, 164, 171.

Otherwise all statutes against conspiracies and combinations could be evaded by the simple expedient of going abroad to make the agreement.

The case of *Brown v. Elliott*, *supra*, is conclusive in this regard. In that case the defendants were indicted for conspiracy to defraud, the place where the conspiracy was formed being unknown. This Court, holding that prosecution might be had at Omaha, where overt acts in pursuance of the conspiracy had been committed, said (225 U. S. 402):

The Constitution of the United States is not intended as a facility for crime. It is intended to prevent oppression, and its letter and its spirit are satisfied if where a criminal purpose is executed the criminal purpose be punished. It is there that its victims are sought and defrauded. It is there that its perpetrators should be brought to the bar of justice for their acts; not for the mere conception of them, but for the actual execution of them.

Again, the power to regulate commerce includes the power to prohibit it except upon conditions that will safeguard the public welfare; and the Anti-Trust Act may be read as prohibiting foreign corporations from engaging in the interstate or foreign commerce

of the United States if they combine to suppress competition therein. *Pipe Line Cases*, 234 U. S. 548-560; *Southern Ry. Co. v. Reid*, 222 U. S. 424, 438; *Atlantic Coast Line R. R. Co. v. Riverside Mills*, 219 U. S. 186, 195, 203; *Noble State Bank v. Haskell*, 219 U. S. 104, 111-113; *United States v. Delaware & Hudson Co.*, 213 U. S. 366.

In *Patterson v. Bark Eudora*, 190 U. S. 169, where a statute forbidding the prepayment of seamen's wages and giving a right of action at the expiration of the voyage for the full amount of wages earned, regardless of prepayment, was sustained by this Court even as to *foreign* vessels, Mr. Justice Brewer said (p. 178):

Indeed, the implied consent to permit them [foreign merchant vessels] to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn it may be extended upon such terms and conditions as the Government sees fit to impose.

It is immaterial that in the Anti-Trust Act the condition upon the right of foreign corporations to engage in the interstate or foreign commerce of the United States is not express but implied. The statute in *Patterson v. Bark Eudora*, *supra*, was not expressly conditional. The statute which in *Noble State Bank v. Haskell*, *supra*, this Court interpreted as going—

from regulation to prohibition except upon such conditions as it may prescribe (219 U. S.

113)—

was not in terms conditional. The same is true of the Carmack Amendment (34 Stat. 584, 595), which the *Atlantic Coast Line Case*, *supra*, held to require interstate carriers—

as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies \* \* \*. (219 U.S. 203.)

Similarly in the *Pipe Line Cases*, *supra*, the statute in question, though not in terms conditional, was interpreted as follows:

\* \* \* while the amendment does not compel them to continue in operation it does require them not to continue except as common carriers. That is the plain meaning as has been held with regard to other statutes similarly framed (234 U. S. 560).

And finally, this Court has already held that the Anti-Trust Act itself contains such an implied condition, for in the *Tobacco Case*, 221 U. S. 106, the Chief Justice declared that as an appropriate means of enforcing the law the Court might issue—

a permanent injunction restraining the combination as a universality and all the individuals and corporations which form a part of or cooperate in it in any manner or form *from continuing to engage in interstate commerce until the illegal situation be cured* (p. 186) [Italics ours.]

If this power of conditional prohibition exists as to state and interstate commerce, then for stronger

reasons it exists as to foreign commerce, for, as held by this Court in the tea case, *Buttfield v. Stranahan*, 192 U. S. 470, 492-493:

Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as *interstate* commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from *foreign* countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion.

\* \* \* \* \*

*As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution. [Italics ours.]*

If defendants' contention were accepted, Congress would be as impotent to *regulate* monopoly in our ocean trade (which is principally carried on by foreign corporations) as it would be to *prevent* it. To insist on freedom of trade is merely one way of regulating trade. If Congress can not prevent rates from being made by agreement it can not prevent them from being made arbitrary, excessive or discriminatory.

Indeed, in the court below defendants boldly adopted this extreme position, the brief for the Hamburg-American Line, the Allan Line, and the Canadian Pacific Railway Company saying (p. 5):

Manifestly, if foreign vessels are permitted to enter and clear at our ports, the transportation furnished by them in respect of rates and of other matters connected with the whole trans-Atlantic voyage can be regulated only by a treaty with the nation to which they belong.

And again, page 17, the same brief continues:

The lawful entering of our ports by foreign steamers, in the exercise of rights secured to them by treaty, can not confer upon Congress the power to prescribe what rates the foreign owners of the steamers shall charge upon the ocean or what contracts they shall be at liberty to enter into with regard to transportation on the ocean.

In other words, we can neither prohibit ocean carriers engaged in our foreign commerce from fixing their rates and practices by agreement, nor

regulate the rates and practices so fixed, no matter how excessive and arbitrary they may be.

This extraordinary contention can not be supported either on principle or authority. A decision adopting it would instantly invalidate our whole system of immigration laws designed to secure to steerage passengers humane and decent treatment not only in New York Harbor but throughout the entire voyage.

The Act of December 19, 1908 (35 Stat. 583), for example, reenacting the provisions of earlier statutes, prescribes minimum requirements as to light, ventilation, space between decks, number of cubic feet of air per passenger, decent sleeping and toilet facilities, etc.

The Act of February 20, 1907 (34 Stat. 898, 901, sec. 9), in effect requires steamship companies to subject their passengers to thorough medical examination in Europe prior to embarkation.

Section 19 of the same Act (34 Stat. 904) requires immigrants of the excluded classes to be carried back by the vessels which brought them and prohibits the owners of such vessels from making any charge or receiving any security for the return passage.

The Act of August 2, 1882 (22 Stat. 186), requires three meals a day, wholesome and sufficient food and water, seats and tables at meal times, space for exercise and medical attendance in transit.

Other regulations, designed to protect American labor but necessarily operative abroad, prohibit employers from contracting with or even advertising



for laborers in foreign countries or assisting them to come to the United States. Still other provisions with similar purpose limit the rights of steamship companies to advertise abroad for passengers. (Act of Feb. 20, 1907, 34 Stat. 898, 899.)

We are aware of no case in which any of these regulations has been held beyond the power of Congress. On the contrary most of them, as the following cases show, have been expressly sustained, though indirectly affecting the conduct of foreign citizens outside the United States.

*Oceanic Steam Navigation Co. v. Stranahan*, 214 U. S. 320, 332.—Statute placing a “duty \* \* \* on the owners of all vessels, to subject all alien immigrants, prior to bringing them to the United States, to medical examination at the point of embarkation.”

*United States v. Norddeutscher Lloyd*, 223 U. S. 512, 518, *supra*.—Statute prohibiting the taking of security for return passage if deported.

*United States v. Lavarello*, 149 Fed. 297.—Seats and tables at regular meals. The court said:

The most important question raised by the demurrer relates to the power of Congress to make penal an omission by a foreign vessel to provide tables and seats at regular meals, for passengers bound to the United States and actually brought into a port of landing. \* \* \* it is considered that the power exists, and it is unnecessary in reaching this conclusion to follow the history of passenger acts from an early time in the last century, or the decisions pertaining thereto (p. 298).

*The European*, 120 Fed. 776.—Serving insufficient food.

*United States v. Nicholson*, 12 Fed. 522.—Overcrowding of passengers.

*O'Carrol v. The Havre*, 45 Fed. 764.—Proper toilet facilities.

*United States v. Craig*, 28 Fed. 795, 800.—Employer held to violate the contract-labor law by making a contract in Quebec.

*United States v. Dwight Mfg. Co.*, 210 Fed. 74.—Employer held to violate the contract-labor law by an offer of employment made abroad without any contract whatever.

*United States v. Baltic Mills*, 124 Fed. 38.—Employer held to violate the contract-labor law by merely advertising for employees in Manchester, England.

2. AS TO THE INTENT OF CONGRESS AND HEREIN AS TO THE TEST OF  
EXTRA-TERRITORIALITY.

Defendants may further contend that conceding the application of the Anti-Trust Act to ocean transportation generally and conceding the power of Congress to make it applicable to combinations affecting such commerce, even though formed in a foreign country and composed of foreign corporations, nevertheless it must be presumed that Congress did not intend to make it applicable to combinations of that description, because to do so would give the statute extra-territorial effect in violation of international law.

We concede that the Anti-Trust Act is not to be applied extra-territorially as to foreign citizens or even as to our own citizens. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347.

The question then becomes, What is the test of extra-territoriality? The following seems to have been the test advanced by the defendants below (brief for Hamburg American Line, Allan Line, and Canadian Pacific Railway Co., p. 14):

The Sherman Act operates only within the territorial limits of the United States and does not reach any restraint or monopolization of our commerce with foreign nations which results from acts done outside of the jurisdiction of the United States.

Taking this to mean that combinations, though operative here, are not subject to the Anti-Trust Act if *entered into* abroad, the proposition is manifestly unsound. Such a construction would render the evasion of the Act so easy as virtually to nullify it altogether.

Would the defendants in the *Trans-Missouri Freight Association Case* have escaped if only, like the present defendants, they had held their meetings alternately at London and Cologne?

If manufacturers in the United States should go to Canada and there agree upon a schedule of prices to be charged in the United States, would they not be subject to the operation of the Anti-Trust Act,

though nothing were done by them here except to sell their goods at the agreed prices? And if a conspiracy as to interstate trade is illegal, though formed abroad, would not a conspiracy as to foreign trade, fixing the price at which exports and imports shall be bought and sold in this country, be equally illegal?

Suppose parallel and competing railroads ran between Chicago and Winnipeg. Could they by agreement entered into at Winnipeg fix through rates and apportion the through traffic to and from Chicago? Would it make any difference if some of the roads were owned by foreign corporations?—or if Canadian law did not prohibit such agreements?—or if water lines via the Great Lakes were substituted for the railroad companies in the supposed case?

Defendants have laid down no general test of extra-territoriality and no general test can be laid down which would exempt them from the application of the Anti-Trust Law and would not at the same time exempt the conspirators in all the supposititious cases above. The truth is that in none of these cases, nor in the case of the defendants, is the restraint of trade or monopoly really *accomplished* by acts committed abroad. It is merely *initiated* there. The plan takes effect in this country; it is intended to do so; its consummating acts are performed here. The mere place where it was initiated is immaterial; and all supposititious cases involving combinations

whose whole existence—beginning, consummation and end—takes place abroad are entirely irrelevant.<sup>1</sup>

In the criminal law, where the question most frequently arises, the general test of extra-territoriality is not, Where was the act, as shooting, counterfeiting, forgery, bribery, libel, etc., initiated? but, *Where did it take effect?* An act, properly speaking, is a voluntary muscular contraction, nothing more. In the broad legal sense, however, a man who is physically outside this country “acts” within it if he produces here effects so dangerous and so proximate to the muscular contraction by which they are initiated that this country is justified on grounds of expediency in holding him responsible. In such a case the actor is “constructively present” within the jurisdiction where the effect is produced, though he may be physically abroad. *Hyde v. United States*, 225 U. S. 347, 362; *Strassheim v. Daily*, 221 U. S. 280; *In re Palliser*, 136 U. S. 256, 265; *United States v. Nord Deutscher Lloyd*, 223 U. S. 512, 516; *Oceanic Steam Nav. Co. v. Stranahan*, 214 U. S. 320, 332; *Armour Packing Co. v. United States*, 209 U. S. 56, 76; *Burton v. United States*, 202 U. S. 344; *United States v. Thayer*, 209 U. S. 39, 44; *Simpson v. State*,

<sup>1</sup> Thus, for example, the case of the Chicago-Winnipeg railroads might be very different if the tracks on the American side of the boundary and the tracks on the Canadian side were owned by two sets of wholly independent corporations. In such a case there might conceivably be a combination between the Canadian railroads, involving only the *local* rates from Winnipeg to the boundary, in which the American roads would take no part whatever, and which, therefore, would have its whole existence outside the United States. But that is not the present case.

92 Ga. 41; *Commonwealth v. Macloon*, 101 Mass. 1, 6, 18.

*United States v. Nord Deutscher Lloyd and Oceanic Steam Nav. Co. v. Stranahan*, *supra*, are good examples of the application of the principle. In the first this Court, though expressly stating that the statute "of course, has no extra-territorial operation," nevertheless held the defendant, a foreign corporation, criminally liable for taking from an immigrant in Germany security for payment of his return passage if deported, placing this holding on the ground that such taking "created a condition which was operative in New York." In the second the defendant, a foreign corporation, was punished here for failure to provide adequate medical inspection in Europe—a mere nonfeasance—resulting in the introduction of a diseased person into this country.

Similarly in the case of contracts to be performed in other countries, their validity is governed by the law of the place of performance. *Story, Conflict of Laws*, sections 242, 244. Contracts permissible in other countries are not enforceable in our courts if they contravene our laws, our morality, or our policy. *Oscanyan v. Winchester, &c., Co.*, 103 U. S. 261, 277; *Kennett v. Chambers*, 14 How. 38; *Walworth v. Harris*, 129 U. S. 355; *Williston's Pollock on Contracts*, 506; *Page on Contracts*, Vol. III, sec. 1729; *Westlake on Private International Law*, 3d ed., 259, 260.

These principles of criminal law and of contract law are peculiarly applicable in the case of conspiracies.

This Court and other courts have repeatedly held that conspiracies are "continuing offences" and may be enjoined or punished wherever operative regardless of where initiated. *Hyde v. United States*, 225 U. S. 347, 362; *Brown v. Elliot*, 225 U. S. 392, 402; *Hyde v. Shine*, 199 U. S. 62, 76; *United States v. Linton*, 223 Fed. 677, 679; *International Harvester Co. v. Missouri*, 237 Mo. 369; 234 U. S. 199; *International Harvester Co. v. Kentucky*, 137 Ky. 668, 674; *People v. Mather*, 4 Wend. (N. Y.) 229, 259; *Commonwealth v. Gillespie*, 7 S. & R. (Pa.) 469, 478; *Commonwealth v. Corlies*, 3 Brews. (Pa.) 575, 578; *Noyes v. State*, 41 N. J. L. 418; *State v. Nugent*, 77 N. J. L. 84, 86; *Bloomer v. State*, 48 Md. 521, 525; *People v. Arnold*, 46 Mich. 268, 275; *Insurance Cos. v. State*, 75 Miss. 25, 34; *State v. Hamilton*, 13 Nev. 386, 393; *Pearce v. Territory*, 11 Okla. 438, 446; *Ex parte Rogers*, 10 Tex. App. 655; *Rex v. Brisac*, 4 East 164; *Reg. v. Connolly*, 25 Ontario 151.

For jurisdictional purposes, all the conspirators are treated as though personally present and conspiring whenever and wherever acts in furtherance of the conspiracy are performed. The Statute of Limitations does not bar prosecution merely because the conspiracy originated more than three years before the indictment. *United States v. Kissell*, 218 U. S. 601, 607. For like reason the defense of extra-territoriality does not apply merely because the conspiracy originated abroad. The conspiracy exists



wherever it operates. As said by this Court in *Hyde v. United States*, 225 U. S. 347, 363:

We have held that a conspiracy is not necessarily the conception and purpose of the moment, *but may be continuing. If so in time, it may be in place—carrying to the whole area of its operations* the guilt of its conception and that which follows guilt, trial and punishment. [Italics ours.]

Again, the same conspiracy may be operative in more than one country. In the very nature of things this must be so of conspiracies affecting foreign commerce, since every current of foreign commerce must run into the territorial limits of more than one country; otherwise it would not be foreign commerce. As said in *Veazie v. Moor*, 14 How. 568, 573:

Commerce with foreign nations must signify commerce which in some sense is necessarily connected with these nations, transactions which either immediately, or at some stage of their progress, *must be extra-territorial*. [Italics ours.]

In accord with these settled principles the test of extra-territoriality for which the Government contends is this, *Is the conspiracy operative within this country and consummated by acts performed here—or, on the contrary, is the plan completely accomplished and exhausted abroad?*

That is a question of fact in each case. Its determination may undoubtedly depend upon the distinction between “acts” and the mere “continuance

of the result" of acts. The Government does not contend that the Anti-Trust Act reaches every combination or conspiracy which has any effect, however remote, within this country. But, in the words of the *Kissell Case*, *supra*, "when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation" within this country, it is a perversion of natural thought to call that intra-territorial cooperation the mere "continuance of the result" of extra-territorial acts.

Let us apply this test of extra-territoriality to the facts of the present case. As we attempt hereinafter to show, the purpose and effect of the steamship combination is to restrain and monopolize the transportation of steerage passengers between the United States and Europe. The combination therefore directly and materially affects a current of foreign commerce of the United States and it affects it during its course within the territorial limits of the United States as well as without.

Not only is the combination thus *operative* within the territorial limits of this country, but many of the acts in pursuance of it are actually performed here. Offices and agents are maintained throughout the United States. Passengers are solicited here. Tickets, both eastbound and westbound, are sold here. Ships enter and depart from our ports, embarking and disembarking passengers, many of whom

are American citizens. Eastbound steerage passengers from inland cities purchase through transportation, both rail and water, from the steamship agents. They are known as "steamship passengers" all the way to the coast and must show their steamship tickets to the railroad officials whenever called for. (Sandford, I R. 365.)

The various acts of unfair competition were and are performed here. The fighting ships sail from New York, their rates are there advertised, and until just prior to the filing of this suit they were chosen there by the so-called "Small Committee" (Nyland, 11 R. 454-455; Cauty, 12 R. 1053; Winter, 12 R. 1158). The boycotting of independent agents and the exaction of discriminatory "commercial allowances" from the railroads also go on within this country.

Finally, the agents of the steamship lines meet in New York in the American Atlantic Conference for the express purpose of carrying out the provisions of the General Pool Agreement and the agreements collateral thereto. (Letter showing purpose, 6 R. 2873; minutes of American Atlantic Conference, 1 R. 388, 385-419; Cauty, 12 R. 1047.)

These facts meet every test of jurisdiction laid down in the conspiracy cases. More than that, they show an actual *doing of business in combination* within this country. The doing of business is not a technicality; it is a fact. Each nation may prescribe how business shall be done within its borders. Comity no more requires us to permit these foreign corporations

to conduct their business here *in combination*, than it requires us to permit them individually to exercise here charter powers contrary to our laws or public policy. *Paul v. Virginia*, 8 Wall. 168, 181; *Bank of Augusta v. Earle*, 13 Pet. 519, 589; *Clarke v. Cent. R. R.*, 50 Fed. 338; *Williams v. Gold Hill Mining Co.*, 96 Fed. 464; *London, Paris & America Bank v. Aronstein*, 117 Fed. 601; *Beale, Foreign Corporations*, sections 112, 118, 120, and cases cited.

In two similar cases, this Court has held the Anti-Trust Act to be applicable.

In the *Tobacco Case*, 221 U. S. 106, 185, a contract between the American Tobacco Company and two British corporations—The Imperial Tobacco Company of Great Britain and Ireland and the British-American Tobacco Company, Ltd.—which parceled out the world's trade, kept the British companies from sending their goods here and kept the American company from sending its goods to England, was held by this Court to violate the Anti-Trust Act, though entered into "in the city of London, where such contract was a legal and proper one." (164 Fed. 703.)

The case of *United States v. Pacific & Arctic Co.*, 228 U. S. 87, is even more directly in point. That case, like the present, involved a combination of carriers operating partly within and partly without the United States, i. e., from Seattle, Washington, and Vancouver, British Columbia, by water to Skagway, Alaska, and thence by railroad into the Yukon district of Canada. The railroads (Canadian owned) leading into the interior and a company owning

the docks at Skagway entered into exclusive through routing arrangements with three steamboat companies (two from Seattle and one from Vancouver) for the purpose of giving the latter a monopoly of the Alaska-Yukon trade. This court said in answer to the same jurisdictional contentions now made (105-106):

The next contention of defendants is that as part of the transportation route was outside of the United States the Anti-Trust Law does not apply. The consequences and, indeed, legal impossibility are set forth to such application, and, *it is said, "make it obvious that our laws relating to interstate and foreign commerce were not intended to have any effect upon the carriage by foreign roads in foreign countries, and . . . it is equally clear that our laws can not be extended so as to control or affect the foreign carriage."* This is but saying that laws have no extraterritorial operation; but to apply the proposition as defendants apply it would put the transportation route described in the indictment out of the control of either Canada or the United States. *These consequences we can not accept.* The indictment alleges that the four companies which constitute the White Pass & Yukon Route (referred to as the railroad) and owned and controlled by the same persons, entered into the combination and conspiracy alleged, with the intention alleged, with the wharves company and the defendant steamship companies. In other words, it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of

the United States, criminal and civil. If we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations. [*Italics ours.*]

The United States circuit judges of the Second Circuit have three times decided against the same contentions. *Thomsen v. Union Castle Mail S. S. Co.*, 166 Fed. 251; *United States v. Hamburg American Line*, 200 Fed. 806; *United States v. Prince Line*, 220 Fed. 230, 234.

In the present case they said (10 R. 5124-5125):

The agreement directly and materially affects foreign commerce and *is partly intra-territorial because it is to be carried out in part in the United States*. Confining ourselves to east bound traffic, it is evident that the contract contemplates the solicitation of business; the making of contracts of carriage; the taking on board of passengers, and the actual commencement of transportation within the territory of the United States. *It requires acts to be done in this country*; such acts are as material and essential as those to be performed abroad, and the part of the contract requiring them can not be separated from the remainder.

The prohibitions of the Anti-Trust Statute apply broadly to contracts in restraint of trade or commerce with foreign nations. This contract directly and materially affects such commerce, and if it unlawfully restrains it, it comes within the statute. We see nothing to war-

rant the contention that the act should be narrowly interpreted as prohibiting only contracts which are to be performed wholly within the territorial jurisdiction of the United States nor—if it were for us to consider—any reason for concluding that a broad construction would lead to international complications.

*As the contract directly and materially affects the foreign commerce of this country by being put into effect here, it is immaterial where it was entered into or by what vessels it was to be, or has been, performed.* Citizens of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad nor by employing foreign vessels to effect their purpose. Such combinations are to be tested by the same standard as similar combinations entered into here by citizens of this country. The vital question in all cases is the same. Is the combination to so operate in this country as to directly and materially affect our foreign commerce? [Italics ours.]

The case of *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, on which defendants chiefly rely, was brought to the attention of this Court in the *Pacific & Arctic Case*, *supra*, in the *Nord Deutscher Lloyd Case*, *supra*, and in *Strassheim v. Daily*, *supra*, and also to the attention of the court below in the present case, but without effect. It is clearly inapplicable here. The circumstances are exactly reversed. In the *Banana Case* the agreements were made in this country, but were executed abroad. In the present case the agreements were



made abroad, but are executed here. In the *Banana Case* damages were sought for acts not tortious where committed. In the present case the Government seeks to enjoin acts which are operative here and many of which are actually committed here and which clearly violate our laws.

The principles of international law, far from prohibiting, expressly sanction the application of our statutes to a combination like the present one. The universally accepted view is stated in *Moore's Digest of International Law*, volume 2, page 244, as follows:

The principle that a man who outside of a country willfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application. [Citing numerous cases.]

The same principle was stated as follows by this Court in *Strassheim v. Daily*, 221 U. S. 280, where the defendant, while in Illinois had contrived through an agent to defraud the State of Michigan (284-285):

If a jury should believe the evidence and find that Daily did the acts that led Armstrong to betray his trust, deceived the board of control, and induced by fraud the payment by the State, the usage of the civilized world would warrant Michigan in punishing him, although he had never set foot in the State until after the fraud was complete. Acts done outside

a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect if the State should succeed in getting him within its power. *Commonwealth v. Smith*, 11 Allen 243, 256, 259; *Simpson v. State*, 92 Ga. 41; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356; *Commonwealth v. Macloon*, 101 Mass. 1, 6, 18.

In *Wildenhus's Case*, 120 U. S. 1, where the jurisdiction of a State court over one charged with murder committed on board a foreign merchant vessel in a harbor of the State was sustained, Mr. Chief Justice Waite said (11):

It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement.

In the present case defendants are carrying on business in this country and to deny our right to require them while so doing to comply with our laws and public policy is to deny us that supremacy within our own domain which is inherent in sovereignty. This is not usurping extra-territorial power. It is merely insisting upon a reasonable degree of control over our own affairs.

We submit, therefore, that the contention that the Anti-Trust Act is inapplicable to the present case has no foundation either in principle or authority.

## III.

DEFENDANT STEAMSHIP LINES ARE PARTIES TO A COMBINATION AND CONSPIRACY TO POOL TRAFFIC IN STEERAGE PASSENGERS BETWEEN PORTS OF THE UNITED STATES AND FOREIGN PORTS AND TO FIX THE RATES OF PASSAGE, THEREBY RESTRAINING FOREIGN COMMERCE IN VIOLATION OF THE ANTI-TRUST ACT.

## 1. STATEMENT OF THE LAW.

In general, price-fixing agreements amongst competitors are in restraint of trade and illegal. No rule of law is more conclusively established. The principle was thus stated by Mr. Justice Hughes in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 408:

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.

Such agreements belong to the class described by the Chief Justice in the *Standard Oil Case* (221 U. S. 1, 56, 59) as "in restraint of trade in the subjective sense"—agreements by which one "voluntarily and unreasonably restrains his right to carry on his trade or business"; or, in the language of Mr. Justice Holmes:

They are contracts with a stranger to the contractor's business (although, in some cases, carrying on a similar one), which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would. (*Northern Securities Case*, 193 U. S., 197, 404.)

See also:

*Standard Sanitary Co. v. United States*, 226 U. S. 20;

*Swift v. United States*, 196 U. S. 375;

*People v. Sheldon*, 139 N. Y. 251;

*Cummings v. Union Blue Stone Co.*, 164 N. Y. 405;

*Trenton Potteries Co. v. Olyphant*, 58 N. J. Eq. 507;

*Nester v. Continental Drilling Co.*, 161 Pa. St. 473;

*Salt Co. v. Guthrie*, 35 O. St. 666;

*Oil Co. v. Adoue*, 83 Tex. 650;

*India Bagging Co. v. Koch*, 14 La. An. 168;

*Noyes, Intercorporate Relations*, 513, Note 1,

where the cases are collected.

The rule is as applicable to the fixing of rates among common carriers, by land or water, as it is to the fixing of commodity prices. This was expressly decided as to railroads in *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 324, and also in *United States v. Joint Traffic Ass'n*, 171 U. S. 505.

The decisions in those cases have since been unanimously reaffirmed not only in the *Northern Securities Case*, 193 U. S. 197 (Mr. Justice Harlan's opinion, p. 330; Mr. Justice Brewer's opinion, p. 360; Mr. Justice Holmes's opinion, in which the Chief Justice, Mr. Justice White, and Mr. Justice Peckham concurred, p. 405), but also in the *Standard Oil Case*, 221 U. S. 1, 68, the *Tobacco Case*, 221 U. S. 106, 179, the *Standard Sanitary Case*, 226 U. S. 20, 49, and the *Union Pacific Case*, 226 U. S. 61, 84, 88.

In *The Union Pacific Case*, 226 U. S. 61, 80-81, 93, and in *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 185, this Court apparently assumed that carriers by water are equally within the rule; and in *Thomsen v. Union Castle Mail Steamship Co.*, 166 Fed. 253 (C. C. A. 2d), the Circuit Court of Appeals so held.

Pooling agreements have the same purpose and effect and stand upon exactly the same footing before the law as agreements to fix prices or rates. Pools were held illegal in—

*Addyston Pipe Co. v. United States*, 175 U. S. 211;

*Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 406, 411;

*United States v. United States Steel Corp.*, 223 Fed. 55, 155, 172;

*C. & O. Fuel Co. v. United States*, 115 Fed. 610 (C. C. A. 6th);

*Wheeler-Stenzel Co. v. Window Glass Jobbers' Ass'n*, 152 Fed. 864 (C. C. A. 3d);

*Leonard v. Abner Drury Brewing Co.*, 25 App. Cas. (D. C.) 161;

*Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173;

*Craft v. McConnoughy*, 79 Ill. 346;

*Vulcan Powder Co. v. Hercules Powder Co.*, 96 Cal. 510;

*Oil Co. v. Adoue*, 83 Tex. 650.

Pools among carriers by railroad were held illegal in—

*D. L. & W. R. Co. v. Frank*, 110 Fed. 689;  
*C. M. & St. P. R. Co. v. Wabash etc. R. Co.*, 61 Fed. 993 (C. C. A. 8th).

*United States v. Lake Shore & M. S. R. Co.*  
 203 Fed. 295.

Pools among carriers by water were held illegal in—

*United States v. Hamburg-American Line*, 200 Fed. 806 (the present case upon demurrer);

*Cole Transportation Co. v. White Star Line*, 186 Fed. 63, 66-67;

*White Star Line v. Star Line Steamers*, 141 Mich. 604, 611;

*Anderson v. Jett*, 89 Ky. 375;

*Stanton v. Allen*, 5 Denio (N. Y.) 434;

*Hooker v. Vandewater*, 4 Denio (N. Y.) 349;

*Watson v. Harlem etc. Nav. Co.*, 52 How. Pr. (N. Y.) 348.

These settled principles were well stated by the circuit judges of the Third Circuit in the case of *United States v. United States Steel Corporation*, decided June 3, 1915, 223 Fed. 55. Judge Buffington with whom Judge McPherson concurred, said (p. 155):

*This country has always been committed to the principle of fair and real competition in business—the struggle between individuals to sell goods in a market free from artificial control or influence—and the Sherman Act merely repeats this principle when it condemns, in the first section, “every contract or combination in restraint of trade.” When, therefore, individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts. [Italics ours.]*

Judge Woolley, with whom Judge Hunt concurred, said (p. 172):

*I know of no law which makes the steadying of the market a justification for fixing and maintaining prices by the concerted action of otherwise competing companies, when the effect of steadying the market is to dominate the industry by establishing prices for its products. The perfection of stabilizing prices can be reached only when monopoly is perfect, and as nothing justifies monopoly, I am of opinion that the stabilizing benefits claimed by the defendants in fixing and maintaining prices are no justification or excuse for what they did. Prices are perfectly stabilized by pools, when entered into and lived up to, yet no one would contend that a pool, however beneficent its results, is either justifiable or legal. If the establishment of uniform prices for the products of an industry should ever be found advantageous or necessary, such an economic policy should be inaugurated and pursued under authority of law, and not by the will of the industry itself.* [Italics ours.]

## 2. APPLICATION OF THE LAW.

No new question is presented by the facts of this case. We have here simply the application of old principles to an old form of combination—a combination which is doubly illegal, for it not only fixes rates, thereby suppressing competition in that regard, but also pools traffic and divides territory, thereby suppressing competition as regards both rates and service.



If there were nothing more here than a rate-fixing agreement it would fall directly within the principle of the *Freight Association* and *Joint Traffic Cases*, *supra*, p. 81.

The General Pool Agreement, however, is far more restrictive of competitive conditions than any simple rate agreement. Competition in rates is not the only kind of competition which the law aims to preserve. Competition in service is quite as important. As observed by this Court in the *Union Pacific Case*, 226 U. S. 61, 87:

Competition between two such systems consists not only in making rates, \* \* \* but includes the character of the service rendered, the accommodation of the shipper in handling and caring for freight and the prompt recognition and adjustment of the shipper's claims.

Under simple rate agreements competition in *service* may continue as actively as ever, for the efficient competitor is immediately and certainly rewarded by securing a larger share of the business. But pooling combinations, by fixing the share of the trade which each member may take, not only remove all inducement to competition in respect of rates, but also prevent, or at least greatly diminish, competition in service as well.

Thus, under the present agreement the more efficient line can not hope to increase its share of the business by improving its service, since its share is absolutely fixed at a definite percentage and it is bound so to arrange its service as not to exceed that

percentage. And lest, in spite of all it should do so, the agreement expressly provides that for every passenger above its allotted quota it shall pay to the other parties a "compensation price" of approximately \$20, which payment is secured by heavy penalties.

All incentive to competition either as regards service or rates is thus killed. And it was so intended, for the commentaries to Agreement AA, which are part of the agreement itself (1 R. 73), expressly say (1 R. 56)—

(a) *The stipulation of a compensation payment for each steerager carried beyond the proportion allotted by this contract forms one of the main features of the entire contract. The payment of such compensation is certainly not the intent and purpose of the contract, but it is the requisite means to deter the lines from following the tendency to exceed their proportion. [Italics ours.]*

(b) The possibility ought not to be excluded to effect alterations with regard to the figure of £4 in the event of it becoming evident, that from extraordinary causes, the stipulated compensation proves to be too low or too high for the purposes of this contract.

\* \* \* \* \*

(d) It was therefore agreed that the compensation can be advanced and lowered by a majority of the Lines representing at least 75 per cent of the shares as fixed in Article 3.

With respect to this provision, Franklin, vice president of the International Mercantile Marine, testified (13 R. 1814):

The spirit of the agreement was that the lines should not carry more or less; that the lines should carry about in accordance with their percentage.

\* \* \* \* \*

The object of the agreement was that the lines should maintain that percentage as closely as possible.

\* \* \* \* \*

The very object of this agreement is to avoid the stronger lines taking away, or attempting to take away, all of the business from the weaker lines.

Cauty, also a vice president of the International Mercantile Marine, testified as follows (12 R. 1097-1098):

Q. Mr. Cauty, I understand you to testify on cross-examination that the purpose of establishing £4 as a standard of compensation was to deter a company from carrying more than its allotment?—A. May I say to *remove any inducement to the company to carry more than its allotment*. I think perhaps that would be a more correct term.

Q. Likewise it was fixed on that basis of £4 so as to not compensate a line that had not carried its allotment to the extent of a profit for being a drone?—A. Well, I hardly think that is correct, Mr. Crim, because supposing a line is overcarrying largely, and you can get a considerable number of £4 without

having to do anything for it, it is not a bad business. *The check really was on the line that overcarried \* \* \*.* [Italics ours.]

It is said that the General Pool Agreement is not perpetual but must be periodically renewed, and that a line which demonstrated its ability regularly to attract more than its quota would at the next renewal demand a larger percentage. The agreement was originally for three years (1 R. 73, art. 27), and in December, 1910, one month before this suit was filed, was renewed for five years more (Ismay, 12 R. 1031). It is obvious therefore that the remote possibility of a larger share of the business five years hence, contingent upon the acquiescence of the other parties, and subject meanwhile to carrying any excess at a loss, is hardly an incentive to competition.

The defendants' own witnesses admitted this by word and conduct. Thus Cauty when shown a letter in which he had suggested in the following terms a pool agreement covering also second-class passengers (12 R. 1079):

We are quite of your opinion that a general advance of at least 20/- all round should be made in the second-class rate. *We think a pool would secure a larger increase*, but I hope the advance of at least 20/- may be agreed, if a pool is found impossible,

testified in explanation:

Failing to get what we thought a satisfactory rate agreement we thought perhaps *the reluc-*

*tance of any lines to advance would be overcome if there was a pool, so that their position was protected.*

Hannah testified (13 R. 1476-1477):

A conference I have said a minute or two ago was where two or three men came together, one representing each line, and arranged for the operation of their several lines, both as to runs, rates and many other matters, and one said you will be satisfied to have \$32 for your line, and you will be satisfied to have \$25 for your line, and you \$30 for your line, and each of these differences was because of some confessed knowledge of superiority or inferiority on the part of one or the other of these lines. Then they would publish their rates on that basis and adhere to them for a time at least, and that was the differential;<sup>1</sup> *they each got as much business as they could; they could beat each other as much as they liked. There was no division of the business then. That was done in conference in the year 1868.*

Q. Now, take the pooling arrangement under AA?—A. *The pooling went further than that; it was made by some of the continental lines, not the British lines—they never were ingenious enough I think for that. That conference was not effective enough to secure the desired end.*

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<sup>1</sup>This was called "the principle of differentials against great speed and superior accommodations." (5 R. 2222.)

Lister testified (13 R. 1496):

Q. Do you know what the reasons were which led the lines to make the agreement AA; if so, will you state what they were?—

A. Yes, I think that the main reason for making the agreement AA was to prevent, if possible, these frequent breakings away from the agreements which had been the practice under the previous rate agreements.

\* \* \* \* \*

Q. Was AA made to affect the same—to act for the same general purpose in the business but *with a stronger obligation as to the lines*—I mean as compared with the conference?—A. Yes, to insure more stability in the business.

Finally, a line is not permitted to advertise its superiority of service even if it has any. Article 16 of the General Pool Agreement reads (1 R. 63):

No circulars or publications shall be issued by any line reflecting upon or instituting comparisons with any conference line unfavorable to the latter \* \* \*.

To insure observance of this rule the lines are required to send copies of their advertising circulars to the secretary, to dismiss immediately any agent who violates the rule, and to join with all other lines in refusing business relations with such agent thereafter. (1 R. 63, 225, 230.)

## IV.

THE COMBINATION AND CONSPIRACY BY UNFAIR AND OPPRESSIVE METHODS OF COMPETITION ALSO PREVENTS OTHER LINES FROM ENGAGING IN THE TRANSPORTATION OF STEERAGE PASSENGERS BETWEEN PORTS OF THE UNITED STATES AND FOREIGN PORTS, THEREBY FURTHER RESTRAINING FOREIGN COMMERCE IN VIOLATION OF THE ANTI-TRUST ACT.

## 1. STATEMENT OF THE LAW.

Combinations and conspiracies to prevent or hinder those outside from competing by employing against them other than normal and legitimate business methods fall within the narrowest conception of combinations and conspiracies in restraint of trade. The following are typical cases:

*Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600—a combination among retail dealers to compel wholesalers not to sell directly to consumers by refusing to buy from wholesalers who do so.

*United States v. Pacific & Arctic Company*, 228 U. S. 87, 104—a combination between three steamship lines, a wharf company and a railroad system, which were connecting carriers, whereby the wharf company and the railroad entered into exclusive through routing arrangements with the steamship lines in order to exclude other steamship lines from the trade affected.

*United States v. Reading Company*, 226 U. S. 324, 351-353—a combination of six railroads to prevent the building of a new competitive line by purchasing



the coal mines and lands from which its prospective traffic would be principally derived.

*Montague v. Lowry*, 193 U. S. 38—a combination of wholesale dealers in tile in San Francisco and of manufacturers of tile in other States by which the dealers agreed not to purchase from nonmember manufacturers and the manufacturers agreed not to sell to nonmember dealers.

The distinguishing mark of this type of combination is the purpose to exclude or interfere with the competition of others. It is not necessary that the exclusion or interference be actually accomplished. If the purpose stated exists and is coupled with adequate power, it becomes dangerously probable that the purpose will be executed, and that is enough to bring the combination within the condemnation of the law. *Swift v. United States*, 196 U. S. 375, 396; *United States v. St. Louis Terminal Railway*, 224 U. S. 383, 394; *United States v. Reading Company*, 226 U. S. 324, 351-352, 370.

The purpose to exclude others is seldom expressed. The principal factors in determining it by inference doubtless are the conduct of the combination toward its competitors and the comprehensiveness of the combination.

The bearing upon its purpose of a combination's conduct toward its competitors of course requires no elucidation.

As to the second factor, where a combination takes in so large a proportion of the units in any

branch of trade that those outside can not hope effectively to compete with it except by sufferance, it is a legitimate inference that one of the purposes of the combination is to prevent effective competition by those outside. This is clear from the *Standard Oil Case*, 221 U. S. 1, 75, where it was held that—

the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, *in and of itself*, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce. [Italics ours.]

Again, in *United States v. St. Louis Terminal Ry.*, 224 U. S. 383, 394–395, and in *United States v. Reading Co.*, 226 U. S. 324, 370, it was recognized that an intent to exclude others might be inferred from the

"extent of the control" acquired by the combination, the Court saying in the latter case:

In the instant case the *extent of the control* over the limited supply of anthracite coal by means of the great proportion theretofore owned or controlled by the defendant companies, and the *extent of the control* acquired over the independent output which constituted the only competing supply, affords evidence of an intent to suppress that competition and of a purpose to unduly restrain the freedom of production, transportation and sale of the article at tide-water markets. [Italics ours.]

There was a similar ruling in *Shawnee Compress Co. v. Anderson*, 209 U. S. 423, 433-434, where it was said:

To what object was the assembling in one ownership or management so many compresses, and keeping the means and declaring the purpose of acquiring more? The answer would seem to be obvious. The first effect would necessarily be the cessation of competition. If there was left a possibility of other compresses being constructed, it was made less by the power that could be opposed to them.  
\* \* \* This case presents something more than the lease of property by the Shawnee Company, induced or made necessary by financial embarrassment. It presents something more than the acquisition by the Gulf Company of another compress—of a mere addition to its business. It presents acts in aid of a scheme of monopoly.

## 2. APPLICATION OF THE LAW.

The facts heretofore stated (*supra*, pp. 22-33) show conclusively that the defendant steamship lines in combination have employed against other lines wrongful methods of competition, with the result and for the purpose of excluding them from the field and acquiring a monopoly.

It is useless for defendants to say that individually they might have employed these methods. There is a potency in numbers which creates a difference—in kind as well as in degree—between the acts of individuals and the acts of combinations. “The Sherman Law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.” *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49. The principle is thus stated in *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440-441:

An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.

The authorities are reviewed and the result stated in *Wyman, Control of the Market*, as follows:

\* \* \* There is the intermediate assumption that the individual refusal by a single man is of the same character as a concerted refusal by many men. This may well be challenged as law, since it is contrary to fact. Even if it

were in the face of the logic of the law, *most men would call this competition unfair*. For most men firmly believe in the perpetuation of the open market; and they realize that if a combination may work its will in this way, the end of industrial liberty is at hand (p. 103).

\* \* \* \* \*

\* \* \* It seems the real truth that the very concert gives combined action a higher potentiality for harm than individual action ever can have. Formal logic does not now support the minority view that the combination is as free to act in this way as an individual is. And public policy certainly seems to be with the majority view that the individual trader should be protected against the pressure of the combination which is breaking up his business relations with those who might otherwise deal with him. The reality of such oppression carries with it, in most minds, the conviction of the essential wrongfulness of such dictation by the combination (p. 106).

(a) The Wrongful Methods.

*Fighting ships*.—Fighting ships, heretofore described (*supra*, p. 23), were condemned by the Report on Shipping Combinations, etc., made by the House Committee on Merchant Marine and Fisheries under House Resolution 587, Sixty-third Congress, and the bill accompanying the report specifically forbids them. (Report, vol. 4, p. 421; Bill, sec. 2.)

The use of fighting ships is analogous to price cutting by a combination in particular localities for the purpose of destroying competition, only to raise the price when the competition has been gotten rid of. The individual line has against it in the contest the aggregate resources of all the members of the combination, and, of course, must succumb.

On this branch of the case the defendants relied in the court below upon *Mogul Steamship Co. v. McGregor*, L. R. 1892, A. C. 25. That case does not support their position. All that was decided there was that admitting the contention that the agreement or combination which caused the alleged injury was in restraint of trade, the plaintiff still had no case because such an agreement or combination was not indictable or actionable at common law. (L. R. 1892, A. C. 36; L. R., Q. B. D., 619, 620, 626.) While not necessary to the decision, three of the judges who sat in the case—Lord Bramwell and Lord Hannen in the House of Lords, and Lord Esher in the Court of Appeals—expressed the view that the agreement or combination in controversy *did* restrain trade. In the *Addyston Pipe Case*, 85 Fed. 271 (C. C. A. 6th), Judge Taft carefully analyzed the *Mogul Steamship case*, concluding as follows (p. 286):

\* \* \* but it was not held that the contract of association entered into by the defendants was not void and unenforceable at common law. *On the contrary, Lord Bram-*

*well, in his judgment (at page 46), and Lord Hannen, in his (at page 58), distinctly say that the contract of association was void as in restraint of trade; but all the law lords were of opinion that contracts void as in restraint of trade were not unlawful in a criminal sense, and gave no right of action for damages to one injured thereby. The statute we are considering expressly gives such contracts a criminal and unlawful character. It is manifest, therefore, that whatever of relevancy the Mogul Steamship Co. case has in this discussion makes for, rather than against, our conclusion. [Italics ours.]*

The District Court decided that the use by the defendants in combination of fighting ships violated the Anti-Trust Act, but its decree, as we think, was inadequate. (See *infra*, p. 125.)

*Boycotting of nonmember agents.*—As previously shown (*supra*, p. 26), the parties to the combination concertedly refuse to employ as agents any persons who also act as agents in the selling of tickets for independent lines. As the business of the independent lines has been so small that it would not pay an agent to work for them alone, the result has been to prevent the independent lines from obtaining satisfactory agents (*supra*, p. 27).

This is a true secondary boycott—a combination to coerce A to cease dealing with B in order to injure B. *Loewe v. Lawlor*, 208 U. S. 204; *Eastern States Lumber Dealers Ass'n v. United States*, 234 U. S. 600.



It is not, as defendants would have us believe, a means of securing honest agents.<sup>1</sup> The test is not, "Is the agent honest," but "Does he serve any independent line." Ismay himself admitted that the rule was really a competitive measure, saying (12 R. 1023):

Q. In general then that rule 9 was enforced to meet the competition of the Volunteer Fleet, the Russo-East Asiatic and the New York & Continental Line?—A. Not those lines specifically, *I think it was put in there to meet the competition of any outside lines which might come along.* [Italics ours.]

Furthermore, this is not a case where an employer requires the exclusive service of his agents. Each steamship line in the combination permits its agents to serve all other lines in the combination—indeed it expects them to do so and holds out that opportunity as an inducement to successful agents to desert independent employers. (Winter, 13 R. 1743, 1745–1746; Peters' letter, 7 R. 3347; Nyland, 11 R. 513; Richard, 12 R. 792–793.)

Thus the right to select agents, like the right to select through-route connections in the *Pacific & Arctic case*, 228 U. S. 87, is exercised not for natural trade reasons—to secure greater responsibility or

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<sup>1</sup> The dishonest ("bunco") agencies, of which so much is said, were almost gone by 1880, and by 1894 had entirely disappeared; not because of the boycotting of nonconference agents, however, but because of the refusal to pay commissions to runners, the insistence upon reliable, bonded agents, and particularly because of the criminal prosecution against a notorious swindler, Henry Rice, which served "to clear out the whole field." (Hannah, 13 R. 1451, 1469–1470; Winter, 13 R. 1732, 1733.)

efficiency—but for the purpose of building up a monopoly.

*Exaction of discriminatory railroad allowances.*—As also shown above (*supra*, p. 28), the parties to the combination, whilst themselves receiving from railroad companies “commercial allowances,” so called, amounting to 10 per cent of the railroad fare paid by steerage passengers, both eastbound and westbound, have at the same time exacted from the railroads an agreement not to pay similar allowances to independent steamship lines.

It is claimed that these allowances are paid for services rendered.<sup>1</sup> If so, then the independent lines are equally entitled to receive them, and the conduct of the defendants in combining to prevent the railroads from paying them is all the more reprehensible.

<sup>1</sup> The flounderings of defendant's witnesses when called upon to describe these “services,” however, were humorous (Kerr, 13 R. 1624, 1626; McCain, 12 R. 850, 870.) The only service is the sale to the prospective passenger of an order for rail transportation simultaneously with the sale of the steamship ticket. True the steamship company is responsible to the railroad for the ticket money thus paid, but the steamship agents are bonded (Winter, 13 R. 1734); their defalcations are practically *nil* (Kerr, 13 R. 1628); the steamship companies have the use of the passengers' money (no inconsiderable sum) sometimes for several months before paying it over (McCain, 12 R. 873); and it is really as much an advantage to them as to the railroads to be able to sell through transportation, both rail and water, at the same time.

That they should receive 10 per cent of the entire railroad fare for such “services” as these is palpably absurd. The fact is they have demonstrated to the railroads their power to control this traffic and they use their power to extort these 10 per cent concessions, which ultimately, of course, have to be paid by the passengers themselves. (1 R. 348 (a); 4 R. 1818, 1819; 1 R. 375, sec. 1; 1 R. 376, sec. 3; McCain, 12 R. 850, 862-863, 870.)

(b) **The Result.**

The effect of these wrongful methods has been set forth in detail in the Statement of the Case. (*Supra*, pp. 29-33.) It is enough now to repeat that they have been completely successful in throttling competition and keeping the combination in full possession of the steerage traffic between the United States and all of Europe north of Cadiz, Spain, including the British Isles and Scandinavia.

(c) **The Purpose.**

The character of the methods employed by the combination against competitors and the result, as above set forth, establish beyond question that one of the purposes of the combination was to exclude from this particular field of commerce any steamship line which refused to join the combination. If confirmation of that purpose were needed we have it in the very comprehensiveness of the combination, in attempts to cover up its actions and in express declarations.

Enough has already been said of the comprehensiveness of the combination. No important line was left out.

Attempts of the combination to cover up its actions show an "ever-present manifestation \* \* \* of a conscious wrongdoing." *Tobacco Case*, 221 U. S., 106, 182.

The roundabout method of selecting fighting steamers, first by a small committee in New York

which signed no papers, made no agreements and kept no minutes regarding its proceedings (4 R. 2091), and later by agencies in Europe (11 R. 539-540), is typical.

Conference proceedings are regarded as "sacred," "confidential in the highest degree" (1 R. 79, par. 15; 1 R. 251.) Secretary Peters, in a circular letter, November 12, 1908, says (7 R. 3721):

It needs no mention that all reports about pool and what is in connection therewith may *in view of the United States laws* turn very much to the detriment of all the parties \* \* \*. [Italics ours.]

In another letter, January 4, 1909, he says (7 R. 3771):

The lines no doubt will all be convinced that it will be well done if on their part the word "*pool*" is absolutely avoided in correspondence as well as in negotiations, agreements etc. \* \* \* it would certainly be advisable to eliminate the word "*pool*" and substitute "arrangement" or some other synonymous word. [Italics ours.]

The Mediterranean agreement has the following commentary (7 R. 3650):

the Italian Lines consider it extremely important that the conclusion of the whole agreement should not become public, but *kept secret for the reason that according to Italian law pool agreements are forbidden.* [Italics ours.]

Urging caution with respect to the boycotting of nonconference agents, the Holland-America Line writes (2 R. 1043):

Similar matters, if brought before a court, may easily lead to further investigation of the present methods employed by the steamship companies, which, in many respects would cause unsatisfactory results. *The course followed by the steamship companies in their different meetings to maintain control of the agents under their supervision is in many ways very arbitrary, and although from the steamship companies' standpoint justifiable, may be condemned if brought before an investigation committee.* [Italics ours.]

In another letter on the same subject it says (I R. 214):

*We strongly fear that by enforcing conference rules we would drive Cunard<sup>1</sup> to freely use anti-trust legislation against us* in whatever way this would be possible and with Mr. Sandford as a Cunard employee we may be certain that if any evidence against us could be presented, it would certainly be expert evidence.

Finally, the documentary evidence contained in the exhibits—the agreements, the conference minutes, and correspondence of the parties—is replete with declarations of the purpose to drive out the independent lines. The following examples are sufficient:

“Agreement AA,” the General Pool Agreement itself, provides for the admission of new lines only

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<sup>1</sup> At the time this letter was written the Cunard Line was not a member of the conference.

by the unanimous vote of all the parties (I R. 66, Art. 22), and imposes the heaviest penalty possible for assisting directly or indirectly opposition lines (I R. 64, Art. 18).

Atlantic Conference minute No. 1, March 25, 1909  
(5 R. 2307):

The competition of the Northwest Transport Line is considered serious \* \* \* but by resuscitating by-law 22 [the fighting ship arrangement] to meet their eastbound departures *it is hoped to make their service unprofitable* \* \* \*. [Italics ours.]

Letter, Russian East Asiatic Co., June 8, 1908  
(4 R. 2148):

The New York & Continental Line steamer which left Saturday had only 350 steerage passengers. This gives you an idea as to how the pooled lines are bucking up against this line *in order to make it nonprofitable* \* \* \*. The Hamburg Line people are certainly very much incensed over this and *they will leave no stone unturned if they can drive them out of the business.* [Italics ours.]

Letter, Russian East Asiatic Co., May 13, 1909  
(4 R. 2116):

*The committee is watching the Northwest Transport Line and it has been agreed among them all that it would be a short life with them.*

Peters's letter, April 25, 1908 (7 R. 3335):

Steamer *Volturmo* sailed on the 14th inst. with 473 passengers \* \* \* the New York & Continental Line had at the beginning prepared themselves for S. S. *Volturmo* for 1,400

passengers, but soon came down in their expectations to 700 until at last even this calculation turned out to be wrong. \* \* \* *We therefore are of the opinion that the first fight against the New York & Continental Line has been excellently won.* [Italics ours.]

Letter, Holland-America Line, June 21, 1907 (1 R. 495):

The Hamburg Line especially was of the opinion that the steamers of the pool lines leaving on the same day as those of the Volunteer and Russian East Asiatic Lines, *should offer a lower rate to the Continent, in order to reduce the revenue of both Russian Lines, to such an extent as to compel them to abandon this policy.* As all the pool lines are equally interested, the loss resulting from such reduction should be participated in by all of them. [Italics ours.]

Letter, North German Lloyd, May 6, 1908 (7 R. 3368), referring to the contest with the Italian Lines just prior to the Mediterranean agreement (*supra*, p. 11):

*We hope not only to ruin the business for the Italian Lines but at the same time to increase the number of returning Italians to such an extent that little room will be left to the direct lines for continental steeragers.* [Italics ours.]

Peters' Letter, April 30, 1908, referring to the boycotting of agents (7 R. 3347):

Since there is a pool all the members of it are likewise interested that no part of the business that comes under the pool is diverted to outside lines \* \* \*.



Circular Letter, April 8, 1908, Peters to pool members (7 R. 3318)—

if under the pooling arrangement it is not possible to get a better control of the agents working for the Parties, so as to prevent them from working for outside competing Lines, *then the contract will fail in the hoped-for result of obtaining higher rates*, for the uncontrollable agents will always find it to their interest to attract and to encourage competition. [Italics ours.]

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We thus have here a combination in respect of transportation which is much more flagrantly violative of the law than the voluntary rate agreements condemned in the *Freight Association Case* and the *Joint Traffic Case*. We have here a combination which not only suppresses competition between its own members in respect of rates, as in those cases, but also in respect of service, and which, in addition, attempts by wrongful and oppressive methods to destroy any competitor who refuses to become a member. As said in *Thomsen v. Union Castle S. S. Co.*, 166 Fed. 251 (C. C. A. 2d)—

\* \* \* if there be any exception to the rule that the purpose of the statute is to preserve competition, it will not be found in a combination of carriers which not only eliminates competition among themselves, but attempts, in the manner shown in this record, to prevent outside competition (p. 253).

## V.

**THE ALLEGED GOOD DONE BY THE COMBINATION IN  
STABILIZING THE BUSINESS IS NO DEFENSE.**

The main ground of defense is the familiar one advanced in behalf of every combination of this nature, namely, that pooling agreements and rate agreements are really beneficial, "stabilizing" the industry and averting ruinous competition.

This, of course, is a plea of confession and avoidance. In the statement of defendants that "in ocean commerce there is no happy medium between war and peace," "*peace*" can only mean cessation of competition. In short, the argument is that combination would be a better law of trade than competition; that in order to avoid the possibility of ruinous competition all competition should be abolished.

That, however, is a matter of opinion, a purely legislative question, and Congress with power to decide has decided in favor of competition. In *United States v. Union Pacific R. Co.*, 226 U. S. 61, 87, the purpose of the Anti-Trust Law was thus stated:

To preserve from undue restraint the free action of competition in interstate commerce was the purpose which controlled Congress in enacting this statute, and the courts should construe the law with a view to effecting the object of its enactment.

In *International Harvester Co. v. Missouri*, 234 U. S. 199, 209, referring to Anti-Trust laws in general, this Court said:

The purpose of such statutes is to secure competition and to preclude combinations which tend to defeat it.

And again in *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129:

According to them, competition not combination, should be the law of trade.

Precisely the same argument was advanced as to railroads in the *Freight Association Case*, 166 U. S. 290, the defendants contending, as here, that in the absence of rate agreements ruinous competition would inevitably follow. This Court said in reply, adopting the language of Shiras, J., in the court below (p. 337):

It may be entirely true that as we proceed in the development of the policy of public control over railway traffic, methods will be devised and put in operation by legislative enactment whereby railway companies and the public may be protected against the evils arising from unrestricted competition and from rate wars which unsettle the business of the community, but I fail to perceive the force of the argument that because railway companies *through their own action cause evils to themselves* and the public by sudden changes or reductions in tariff rates they must be permitted to deprive the community of the benefit of competition in securing reasonable rates for the transportation of the products of the country. \* \* \* balancing the benefits as against the evils, the law of competition remains as a controlling element in the business world. \* \* \* The time may come when the companies will be relieved from the operation of this law, but they can not, by combi-

nation and agreements among themselves, bringing about this change.

The same argument was reiterated by Mr. Carter in his brief in the *Joint Traffic Association Case*, 171 U. S. 505, at pp. 521-522, 526, was answered by the Solicitor General, at pp. 546-547, and was again rejected by this Court as follows (pp. 576-577):

It is stated that the only resort open to railroads to save themselves from the effects of a ruinous competition is that of agreements among themselves to check and control it.

\* \* \* There can be no doubt that the general tendency of competition among competing railroads is towards lower rates for transportation, and the result of lower rates is generally a greater demand for the articles so transported, and this greater demand can only be gratified by a larger supply, the furnishing of which increases commerce. This is the first and direct result of competition among railroad carriers.

\* \* \* \* \*

It is not only possible but probable that good sense and integrity of purpose would prevail among the managers, and while making no agreement and entering into no combination by which the whole railroad interest as herein represented should act as one combined and consolidated body, the managers of each road might yet make such reasonable charges for the business done by it as the facts might justify. An agreement of the nature of this one which directly and effectually stifles competition, must be regarded under the statute as one in

restraint of trade, notwithstanding there are possibilities that a restraint of trade may also follow competition that may be indulged in until the weaker roads are completely destroyed and the survivor thereafter raises rates and maintains them.

In the *Northern Securities Case*, 193 U. S. 197, this Court again refused to consider the argument that disastrous consequences would ensue from competition, Mr. Justice Harlan saying in his opinion announcing the affirmance of the judgment below (pp. 351, 352):

Many suggestions were made in argument based upon the thought that the Anti-Trust Act would in the end prove to be mischievous in its consequences. Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of its provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions.

\* \* \* The suggestions of disaster to business have, we apprehend, their origin in the zeal of parties who are opposed to the policy underlying the act of Congress or are interested in the result of this particular case; at any rate, the suggestions imply that the court may and ought to refuse the enforcement of the provisions of the act if, in its judgment,

Congress was not wise in prescribing as a rule by which the conduct of interstate and international commerce is to be governed, that every combination, whatever its form, in restraint of such commerce and the monopolizing or attempting to monopolize such commerce shall be illegal.

Very recently, in the case of *United States v. United States Steel Co.*, 223 Fed. 55, the circuit judges for the Third Circuit unanimously held that pooling agreements and rate agreements can not be justified as a means of steadying the market, Judge Wooley saying (p. 172):

I know of no law which makes the steadying of the market a justification for fixing and maintaining prices by the concerted action of otherwise competing companies, when the effect of steadying the market is to dominate the industry by establishing prices for its products. The perfection of stabilizing prices can be reached only when monopoly is perfect, and as nothing justifies monopoly, I am of opinion that the stabilizing benefit claimed by the defendants in fixing and maintaining prices are no justification or excuse for what they did.

The same general defense—that the combination produced results beneficial to the public—was also rejected by this Court as a matter of law in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 40, 49, and *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 613, and in *Intern-*

*tional Harvester Co. v. Missouri*, 234 U. S. 199, where it was said (p. 209):

It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect.

The contention that competition would itself lead to monopoly, because some single company would ultimately drive all others from the field is based upon one or the other of two false assumptions. It either assumes in some one company a monopoly of efficiency such as never has existed and probably never will exist (*Cash Register Case*, 222 Fed. 599, 619; *Steel Case*, 223 Fed. 55, 163), or it assumes that, irrespective of efficiency, the company possessing the greater resources would be permitted to ruin all the rest; i. e., that neither the Anti-Trust Law nor the "unfair competition" section of the Trade Commission Act (38 Stat., p. 719, sec. 5) provides a remedy against systematic and persistent selling below cost or carrying below cost, with the intention of destroying a competitor.

Defendants attempt to distinguish the railroad cases upon the ground that railroads have a certain amount of local, noncompetitive traffic to sustain them in times of competition, whereas steamship lines are competitive as to their entire business. We dispute this distinction. Obviously, steamship lines from Hamburg, Antwerp, Rotterdam, Liverpool and Libau each possesses a certain local tributary area as against the others. On the other hand, railroads



also are competitive as to the great bulk of their business, and this was particularly true as to the transcontinental lines involved in the *Trans-Missouri Freight Association Case*, the *Joint Traffic Case*, and the *Northern Securities Case*. The through traffic, which is the competitive traffic, is of absolutely vital importance. Nor would the railroads be permitted to recoup losses on competitive traffic by raising rates on local traffic above a reasonable return for the particular service rendered. (*Rates for Transportation of Anthracite Coal*, 35 I. C. C. 282.)

Again, in the case of steamship lines, the fact that ships unsuccessful in a given trade may be sold or transferred to other ports or to another trade suggests a way of moderating competition where it has become excessive. Railroads, however, have no such mobility. They can not move about. Their lines—rights of way, station buildings, etc.—are fixed. They must get business where they are or not at all. It would seem, therefore, that railroads would be even more in danger of “ruinous” competition than would steamship lines.

Moreover, the ground advanced to differentiate steamship lines from railroads, namely, that the former have only competitive traffic, would, if true, merely serve to identify them with many industries. It would exempt from the Anti-Trust Act not only rate-fixing combinations amongst steamship lines but also price-fixing combinations among merchants or manufacturers serving substantially the same territory—e. g., a combination of all

the aluminum manufacturers at Niagara Falls, or of all the anthracite producers in Pennsylvania, or of all the textile manufacturers of New England. It would have exempted the agreements in the *Addyston Pipe Case*, 175 U. S. 211, in *Montague v. Lowry*, 193 U. S. 38, in the *C. & O. Fuel Case*, 115 Fed. 611 (C. C. A. 6th), and the pooling agreements and "Gary dinners" so recently condemned in the *Steel Case*.

Finally, whilst, as above shown, the defense that this combination has stabilized the business is legally irrelevant, it is by no means established in point of fact that ruinous or even excessive competition would break out if there were no such combination. Thus, Mr. Ismay, president of the International Mercantile Marine and certainly as well qualified as anyone to speak upon the subject, testified (12 R. 1044):

Q. Would you say that but for the conferences and pools now in existence the rates would be much less? Would you be fighting each other?—A. *I think we have more sense now than we had a few years ago. I do not think we should be fighting now.* [Italics ours.]

Mr. Franklin, vice president of the same company, also testified (13 R. 1806) that,

None of the prominent carrying lines have gone out of business since I have been connected with the passenger trade,

and further stated that any talk of competition narrowing this great business down even to two lines would be "ridiculous." (13 R. 1832.)

## VI.

THE FACT, IF IT BE A FACT, THAT THE RATES CHARGED  
HAVE BEEN REASONABLE IS NO DEFENSE.

The Anti-Trust Law is designed not to regulate monopoly but to prevent it—not to regulate prices fixed by combinations but to assure the fixing of prices under competitive conditions and to preclude combinations which would defeat that end.

In this view of the law the test of the legality of a combination is not its present effect on prices, but its *effect on competition*. If it unduly restricts competition, then it is immaterial that for the time being the combination may exercise its power benevolently.

Accordingly, it has been held over and over again that the fact that the rates or prices charged by a combination are reasonable is no defense under the Anti-Trust Act. *United States v. D. L. & W. R. Co.*, 238 U. S. 516, 535; *Union Pacific case*, 226 U. S. 61, 88; *Addyston Pipe Co. v. United States*, 175 U. S. 211, 238; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 565, 568, 569; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 324; *Pearsall v. Great Northern Ry. Co.*, 161 U. S. 646, 676, 677. In *United States v. Joint Traffic Ass'n* the whole matter was thus summarily disposed of (p. 565):

It was considered in the other case [*United States v. Trans-Missouri Freight Ass'n*] that the rates actually fixed upon were reasonable, while the rates fixed upon in this case are also admitted to be reasonable.

With respect to the case of *Attorney General v. Adelaide S. S. Co.*, L. R. 1913 A. C. 781, cited by the defendants, it is enough to say that that case was decided under the peculiar terms of the Australian Industries Preservation Act making actual intent to cause "detriment to the public" an essential ingredient of the offense. The distinction between the Australian statute and the Sherman Act is so fundamental that the House of Lords itself in the *Adelaide Steamship Case* refused to consider the decisions of this Court, saying, with particular reference to the *Standard Oil Case* (801):

*Their Lordships do not think that the decisions themselves are of any real assistance in the present case.* The Sherman Act construed strictly makes every contract or combination in restraint of trade and every monopoly or attempt to monopolize a statutory misdemeanor irrespective of any sinister intention on the part of the accused, and irrespective of any detriment to the public. The actual decision is that contracts in restraint of trade which are enforceable at common law are impliedly excepted from the express provisions of the Act. The enforceability of the contract becomes in this way the test of its legality. [Italics ours.]

Whilst the reasonableness of the rates established by the present combination is thus wholly immaterial, nevertheless we do not wish to leave the Court with any mistaken impression as to the facts. We, there-

fore, set forth in a footnote grounds for regarding the existing rates as excessive.<sup>1</sup>

<sup>1</sup> In the first place the general statements by some of defendants' witnesses that the existing rates are "reasonable" establish nothing. "Reasonableness of rates can not be proved by categorical answers." (*Interstate Commerce Commission v. U. P. R. Co.*, 222 U. S. 541, 549.)

Statements of dividends paid are also inconclusive. Operating expenses may be swelled by capital expenditures for new ships and equipment. Earnings may be carried to surplus. Cabin passenger or cargo rates may be too low. Capitalization may be figured according to the English method of accounting which, as shown in the *Kansas City Southern Case*, 231 U. S. 423 (Government brief, p. 4), has resulted in a capitalization of English railroads at \$265,000 per mile as against less than \$60,000 per mile in the United States. Only by a complete analysis of the carrier's accounts would it be possible to tell with any degree of accuracy the profits on their steerage business. No such analysis exists. The carriers themselves have never made one. They do not even apportion their operating expenses and fixed charges between passenger traffic and cargo. (*Ismay*, 12 R. 1027; *Thomas*, 12 R. 668.)

Two witnesses, *Hannah* (13 R. 1440) and *Richard* (12 R. 932), testified that rates to-day are slightly lower than in 1870. Two others, *Lister* (13 R. 1507) and *Winter* (13 R. 1740), testified, however, that rates have remained about the same since 1880, increasing slightly. It is true that the service has improved. It is equally true that progress in the art, such as multiple expansion engines, resulting in economy of fuel (*Hannah*, 13 R. 1460), larger ships, resulting in less cost per passenger (*Hannah*, 13 R. 1469 fol. 4406; *Lister*, 13 R. 1552), and greater speed, resulting in more trips and in more complete utilization of capital (*Hannah*, 13 R. 1442-1443), have tended so greatly to diminish expenses that the mere fact that rates have remained about the same gives rise in and of itself to a presumption of unreasonableness.

Furthermore, several witnesses agreed that the "out of pocket cost" of carrying steerage passengers is approximately \$12 (*Thomas*, 12 R. 651, 661-667; *Cauty*, 12 R. 1070). Competent witnesses testified that a rate of \$20 or \$21 would pay all expenses and, under favorable conditions (steerage, cabin and cargo space all well occupied) might even result in profit (*Lederer*, 12 R. 720, 721; *Thomas*, 12 R. 662-663; *Straus*, 12 R. 774; *Winter*, 13 R. 1749-1750; *Hannah*, 13 R. 1478-1479).

The average steerage rate is \$35 on ordinary steamers and from \$3 to \$5 more on steamers of the highest type (*Nyland*, 11 R. 509). Taking the view most favorable to the defendants, a \$35 rate upon a service costing \$21, results in a profit of \$14—66½ per cent.

Inasmuch as the "fighting rates" were usually about \$21, defendants have attempted to show an inconsistency between the above figures and the Government's contention that the Russian Volunteer Fleet, the New York & Continental Line and the Northwest Transport Company were driven out of business. No such inconsistency exists. The fighting ships

## VII.

## THE REASONING OF THE DISTRICT COURT CONSIDERED;

The decision of the District Court seems to proceed upon the theory that the legality of the combination is to be determined not by ascertaining whether the *restriction of competition* brought about by it is undue or unreasonable, but by ascertaining whether the "*course of conduct*" pursued, considered apart from its effect upon competition, is undue or unreasonable. In other words, though the combination may totally suppress competition, as here, it is yet not unlawful if that seems to the judge a reasonable thing to do under the circumstances of the particular case. Thus the opinion states (10 R., 5129-5130):

To determine whether any particular *course of conduct* is "undue" or "unreasonable" involves, of course, a consideration of all the surrounding circumstances, which may be multifarious. Moreover, opinions will sometimes differ as to what should be the answer to such a question. Upon a given statement of facts twelve unprejudiced jurymen will sometimes unanimously reach a conclusion that the conduct of an individual evidenced "due" and "reasonable" care and prudence, when upon

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prevented their opponents from getting full quotas of passengers. Being new lines, the initial expenses of the independents were naturally very great, particularly the Volunteer Fleet which was developing a new port and had additional difficulty securing freight cargo. Furthermore, the independent lines were forced to pay larger commissions to their agents. In most cases they were unable to secure the 10 per cent "commercial allowances" from the railroads. And finally, once the determined character of the opposition had been demonstrated, they could hardly be expected to continue indefinitely to carry on business even at cost. (Straus, 12 R. 765.)



the same state of facts twelve other unprejudiced jurymen will unanimously reach a different conclusion. \* \* \* So, too, when question arises in an equity court as to the "reasonableness" of certain transactions, different chancellors may differ in their answers. [Italics ours.]

And in another passage (10 R. 5133):

\* \* \* in view of the peculiarities of ocean transportation, the method adopted by the defendants—if purged of its obnoxious feature, the "fighting ship"—is a reasonable one \* \* \*.

Thus, apparently, the Court construed the law as if it read "no *unreasonable conduct* in trade shall be permitted." But competition may be materially abridged—in fact may be completely suppressed—by combinations whose conduct in and of itself, apart from its effect upon competition, might be wholly reasonable, indeed laudable.

The distinction is absolutely vital. The Government does not contend that all combinations of competitors are prohibited. It does contend, however, that where a combination necessarily results in "greatly abridging the free operation of competition" (*Union Pacific Case*, 226 U. S., at p. 88), and *a fortiori* where it practically destroys competition, the law is violated irrespective of the reasonableness of the conduct of the parties otherwise considered.

Furthermore, if there were no more definite standard for determining violations of the law



than the varying opinions of judges as to what constitutes reasonable conduct, then indeed would there be ground for complaining of the uncertainty of the law. For example, a pooling agreement among all the competitors in one branch of trade might be held illegal, while another pooling agreement of precisely similar character involving another branch of trade might be held legal.

Under such a construction of the law there would really be no standard whatever but "the variant economic views of individual judges"; and before a judge not in sympathy with the law *all* combinations would escape. As said by the late Mr. Justice Lurton (then a circuit judge) in *Park & Sons v. Hartman*, 153 Fed. 24, 46:

It has been suggested that we should have regard to new commercial conditions and a tendency toward a relaxation of old common-law principles which tend to prevent development on modern lines. This is an argument better addressed to legislative bodies than to the courts. *Neither is it wise for the courts to countenance the introduction of artificial distinctions dependent upon the variant economic views of individual judges.* Distinctions which are specious or analogies which are but apparent will but afford opportunities to whittle away broad economic principles lying at the bottom of our public policy, principles which have long received the sanction of statesmen and the approving recognition of a long line of jurists. A like argument is expected whenever some new method of circumventing freedom of com-

merce comes under the tests of the law. It was made and answered by Judge Taft in the *Addyston Pipe Case* (85 Fed. 271, 282-283) with a strength to which we can add nothing. [Italics ours.]

But, says the court below, this is the "rule of reason" adopted in the *Standard Oil Case*, 221 U. S. 1. On the contrary, as we think, instead of adopting any such construction of the law, the Chief Justice both in the *Standard Oil Case* and in the *Tobacco Case*, expressly disavowed it. In the *Standard Oil Case*, 221 U. S. 1, 65, 67, he said, with reference to the railroad rate agreement cases:

That as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, *they could not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made* (65).

\* \* \* \* \*

The confusion which gives rise to the question results from failing to distinguish between the want of power to take a case which by its terms or the circumstances which surrounded it, considering among such circumstances the character of the parties, *is plainly within the statute, out of the operation of the statute by resort to reason*, in effect to establish that the contract ought not to be treated as within the statute, and the duty in every case where it

becomes necessary from the nature and character of the parties to decide whether it was within the statute to pass upon that question by the light of reason (67). [Italics ours.]

This was reiterated in the *Tobacco Case*, 221 U. S. 106, 179-180:

In other words, it was held [in the *Standard Oil Case*], *not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable*, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect. [Italics ours.]

In these passages this Court anticipated precisely the error into which the Court below fell in the present case. That is to say, although agreements by carriers to pool traffic and fix rates are prohibited by the law, the District Court here attempted to remove such an agreement from the operation of the law by a finding that it was reasonable under the circumstances of the particular case.

The District Court also relies upon the report of the House Committee on Merchant Marine and Fisheries on shipping combinations (63d Cong., 2d sess., Doc. No. 805), which in substance recommended that rate

and pooling agreements among steamship lines be permitted, subject to rigid Government regulation, including the control of rates. (Report, pp. 419-421; bill, H. R. 17328, 63d Cong., 2d sess.) Obviously, however, this is not a finding that such agreements are not now prohibited. It is a recommendation that the law prohibiting them be changed under certain conditions. Indeed, section 3 of the bill introduced by the chairman of the committee, Mr. Alexander, to carry out the recommendations of the report, expressly provides for *exempting* such agreements from the Anti-Trust Laws, *when approved by the Interstate Commerce Commission*. (H. R. 17328, 63d Cong., 2d sess.)

Whether Congress will see fit to adopt this recommendation is at least problematical. Similar recommendations have been repeatedly made regarding railroad combinations, notably by President Roosevelt (messages, May 4, 1906; Dec. 3, 1907; and Mar. 25, 1908), and by the Interstate Commerce Commission (see *Freight Association Case*, 166 U. S. at 365-369). These recommendations have never been adopted and railroads still operate on a competitive basis. Congress may hold the view of Mr. Morawetz, long chairman of the board of the Atchison, Topeka & Santa Fe Railroad, who, writing in the *Harvard Law Review*, May, 1909, said (vol. 22, p. 495):

The only effective means of regulating railway rates have been and still are *competition* by rail and by water, the necessities of trade

and commerce, and the enlightened self interest of the railway companies themselves. [Italics ours.]

If competition is desirable as to railroads, whose rates and practices are subject to regulation by the Interstate Commerce Commission, for greater reason it is desirable as to steamship lines, which are subject to no regulation at all. In any event, unless exempted by statute, steamship lines, like all other enterprises, must continue subject to the Anti-Trust Law. As said in the *Freight Association Case*, 166 U. S. 290, 337:

The time may come when the companies will be relieved from the operation of this law, but they can not, by combination and agreements among themselves, bring about this change.

## VIII.

### CONCERNING THE REMEDY.

The General Pool Agreement, known as Agreement AA, is the heart of the combination and the principal means by which the main object of the combination, namely, suppression of competition amongst its own members, is attained.

Therefore, that agreement should be adjudged in violation of the Anti-Trust Act and ordered to be canceled and the parties should be enjoined from further carrying out its provisions and from entering into or performing any similar agreement in respect of the transportation of steerage passengers, east-

bound or westbound, between the ports of the United States and European ports. The defendants should also be enjoined from fixing by agreement the rates for such transportation.

They should also be enjoined from concertedly refusing to employ as agents persons also employed as agents by other lines; and from combining, conspiring, or otherwise acting together for the purpose of preventing any other lines receiving from railroads "commercial allowances," so-called, in respect of steerage passengers.

The provision of the decree relating to fighting ships merely prohibits the defendants from combining to operate "*extra vessels*" as fighting ships, and does not prohibit them from operating *regular vessels* as fighting ships. (10 R. 5138.) It should be made to do so. Obviously there is no distinction in principle between the operation in this manner of *extra vessels* and of *regular vessels*.

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#### CONCLUSION.

We have here a combination of all the more powerful trans-Atlantic steamship lines which not only completely suppresses competition amongst the members of the combination both in respect of rates and of service for a very important class of traffic, but also attempts by wrongful and oppressive methods to destroy any line which refuses to become a member.

We submit, therefore, that the decree of the District Court should be reversed, with directions that relief be awarded as hereinabove indicated.

G. CARROLL TODD,  
*Assistant to the Attorney General.*

THURLOW M. GORDON,  
*Special Assistant to the Attorney General.*

OCTOBER, 1915.

O



No. 331.

THE UNITED STATES OF AMERICA,

*Appellant.*

HAMBURG-AMERIKAISCHE RECHTSFAHRT  
AGENTS-GESELLSCHAFT, et al.,

*Respondents.*

No. 332.

HAMBURG-AMERIKAISCHE RECHTSFAHRT  
AGENTS-GESELLSCHAFT, et al.,

*Appellants.*

THE UNITED STATES OF AMERICA,

*Respondent.*

Appeals From the District Court of the United States  
for the Southern District of New York.

Brief for the Defendants, The Cunard Steamship  
Company, Ltd., and Charles P. Sumner.

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IN THE  
Supreme Court of the United States,

OCTOBER TERM, 1915.

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No. 289.

THE UNITED STATES OF AMERICA,  
*Appellant,*

*v.*

HAMBURG-AMERIKANISCHE PACK-  
ETFAHRT-ACTIEN GESELLSCHAFT,  
*et al.,*

*Respondents.*

---

No. 332.

HAMBURG-AMERIKANISCHE PACK-  
ETFAHRT-ACTIEN GESELLSCHAFT,  
*et al.,*

*Appellants,*

*v.*

THE UNITED STATES OF AMERICA,  
*Respondent.*

---

Appeals From the District Court of the United  
States for the Southern District of New York.

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**BRIEF FOR THE DEFENDANTS, THE  
CUNARD STEAMSHIP COMPANY,  
LTD., AND CHARLES P. SUMNER.**

This is a suit in equity brought by the United States under the Federal Anti-Trust Act, 26 Stat., 209, C., 647. Most of the North Atlantic passen-

ger lines and their agents in the United States are named as defendants. It is alleged in the petition that on February 5th, 1908, at London, England, the defendant-lines entered into an unlawful combination and executed a contract bearing date that day, generally known as "Agreement AA," a copy of which is annexed to the petition.

After this suit was started, the Standing Committee of the House of Representatives on Merchant Marine and Fisheries made a most thorough investigation of the whole subject of steamship agreements and affiliations in the American foreign trade (House Res., 525 and 587, 62nd Congress and House Res., 205, 63rd Congress). The testimony and record in this suit were furnished to the Committee by the Department of Justice and are referred to extensively in the Committee's Report, to which we shall later allude. An analysis of the provisions of agreement AA is set forth at pages 31-33 of the Report of the Congressional Committee and is copied verbatim in this brief for the convenience of the Court.

The defendants demurred to the petition. The question presented by the demurrers, briefly stated, was whether Congress had intended the Anti-Trust Act to apply to the international commerce referred to in the petition. The demurrers were overruled. (Opinion, 10 R., 5123-5126; 200 Fed., 806).

On final hearing, the Court considered the case upon the merits and found that with the exception of the running of "fighting ships" (a matter not provided for by the Agreement AA) the agreement was a reasonable one and that commerce was not unduly or unreasonably restrained, and accordingly issued an injunction against the continuance of "fighting ships" and dismissed

the petition with respect to all other prayers for relief. (Opinion, 10 R., 5127-5133; 216 Fed., 971; Final Decree, 10 R., 5136-5138.)

The United States appeals from the final decree. Its assignments of error will be found in Vol. 10 of the Record, pp. 5144-5163.

Most of the defendant steamship lines and their agents filed cross appeals from the final decree and assigned as error that the District Court erred in not dismissing the petition as to all the relief prayed for, upon the ground that the Anti-Trust Act was not intended by Congress to apply and does not apply to the international commerce covered by the issues in this case. (Transcript of Record on Cross Appeal, 14 R., pp. 4-5.)

### **POINT I.**

**The Agreement AA does not violate the provisions of the Anti-Trust Act.**

The question here presented is, whether, under the Anti-Trust Act, as recently interpreted by this Court, the agreement of the defendant companies and their acts in carrying out that agreement are an unreasonable restraint of international commerce so as to come within the condemnation of the act. The discussion of this subject is primarily a discussion of facts, and it will, therefore, serve no useful purpose to make a preliminary statement of facts which shall be independent of the discussion which those facts invite.

The question whether an agreement or an act is, or is not, an unreasonable restraint of a certain branch of commerce depends chiefly on facts relating to that particular subject. This Court has

frequently pointed out that Congress cannot have intended by the Anti-Trust Act to condemn all combinations which might, in any sense, be regarded as a restraint of trade or commerce, for, if that had been the intention, a large proportion of all the necessary and proper agreements relating to interstate or foreign trade or commerce would be illegal. In applying the rule of reason to this proceeding, it is, therefore, necessary to consider:

A.—The physical and financial conditions controlling the carriage of steerage passengers on the North Atlantic, as those conditions affect the subject of combinations between carriers.

B.—The attitude and policy of the United States Government toward combinations affecting the carriage of passengers.

C.—The reasons and conditions which led up to the making of Agreement AA.

D.—The provisions of Agreement AA.

E.—The actual effect of Agreement AA on the carriage of steerage passengers.

### A.

The physical and financial conditions controlling the carriage of steerage passengers on the North Atlantic, as those conditions affect the subject of combinations between carriers.

The complaint which the government makes in the petition in this proceeding is, in effect, that the public suffers by reason of the combination of the defendants. It is not claimed that the combi-



nation results in giving the public inferior service; indeed, the government admits "that the service has improved" (Govt.'s Brief, note, p. 117), but the government claims that it results in the charging of arbitrary and excessive rates and that it is the combination which makes these excessive rates possible.

There is no claim and no proof of any pooling of earnings, but it was claimed, and to an extent proved, that Agreement AA was intended to operate, and did operate, to give to the various defendant lines the share in the steerage traffic which they had previously had and to maintain their previous percentages of the traffic.

It will be shown hereafter that Agreement AA did not, and could not, make an arbitrary division of the business and was not intended to do so; that there has been constant competition among the defendant lines since 1908; that the percentages fixed by the agreement are subject to revision at short intervals and that the lines are constantly trying to increase their earnings with a view of getting better percentages on these readjustments. But Agreement AA had, and was intended to have, a tendency to protect each line in retaining the business it had previously shown itself able to get and keep.

This combination differs in essential features from most of the combinations which have been made by land carriers, but aside from this difference there is an essential difference between transportation conditions on the sea and transportation conditions on the land. And this essential difference makes the legal aspects of a combination of sea carriers entirely different from those of a combination of carriers on land, so far as regards the matter complained of in this proceeding; that is, a monopolizing for the purpose of

charging arbitrary and excessive rates. This distinction between land combinations and sea combinations grows out of the physical distinction between the two methods of carriage.

For example: If four lines of railroad extend between two terminals, as say New York and Chicago, and if these four lines form a combination, that combination will, as a practical matter, monopolize the traffic, because a fifth line could not afford to go to the expense of acquiring franchises, buying rights of way and terminals, constructing tracks, tunnels and bridges and buying rolling stock on the chance that, after a fight with the combination, it could acquire a remunerative part of the business. It would be physically possible to build a fifth road, but financially it would be practically impossible. In other words, the difficulties standing in the way of the construction of a new railroad between terminal points already connected are so great that where the existing roads combine it means the sort of a monopoly which cannot be broken, and, therefore, the sort of a monopoly which can raise its rates to an arbitrary figure.

On the sea conditions are entirely different. Steamers of a fair grade can be used for almost any traffic on any sea. A steamer changing from one trade to another, or from one route to another, goes to no expense except possibly for minor readjustments between decks. The owners are not required to obtain franchises or permits, and do not even need to acquire piers. Thus, a steamer which fourteen years ago may have been carrying troops and supplies to South Africa, may a few years later have been carrying immigrants on the North Atlantic, and then later carrying hides from the Argentine and may now be carrying horses to Europe, and so it may go on seeking a profit

wherever that profit may be found anywhere in the carrying trade of the world. At the present time the demands of our export trade, due to the European war, have attracted tonnage from all over the world and will continue to do so as long as freight rates remain high and the business remunerative. As Mr. Lister, of the Cunard Line, in comparing competitive conditions on land and sea, testified: "In the steamship trade on the ocean you only want one boat with a tight bottom to cross the Atlantic with, and the Atlantic is yours" (13 R., 1498). This is particularly true of the carriage of steerage passengers, for many steamers are available for that purpose which would not be available for first cabin passengers. *Thus, it happens that the carrying trade on the sea is on an intensely competitive basis.*

If, then, lines attempting to maintain regular sailings and schedules in a given trade—that is, attempting to maintain a service corresponding to that of a railroad on land, as distinguished from the roving work of the so-called "tramp steamers"—form a combination, they cannot raise rates to an arbitrary and excessive amount. They could not do it if they wished to. As soon as any combination of lines raises rates to anything more than a reasonably remunerative figure, the condition caused is analogous to that caused by a vacuum in the physical world; the tonnage of the whole world is attracted, and other lines and vessels come in. Lines which have established regular sailings and schedules over a particular route cannot afford to create fictitiously high rates, for that is just what will bring in new competitors. A combination of sea carriers may be used to maintain reasonable rates, to prevent disorganization of the business and to maintain regularity of sail-

ings and schedules, but it cannot be used to maintain fictitious prices.

Another difference between carriage conditions on land and those on the sea is that rate wars not only develop more easily on the sea, but are much more disastrous to both the carrier and the public than is the case with rate wars on land.

A railroad has a natural monopoly of the carriage from most of its stations, and generally has to meet competition only between terminal points. In the settled portions of any community there will be found along the line of any of the railroads a series of towns and cities practically dependent on the railroad for transportation and a railroad can often exist on this traffic which it monopolizes, even if it has to cut rates and lose money on business between terminals. In the United States the Interstate Commerce Act has somewhat affected this power of the railroads to live on way stations, but as a matter of natural condition it is obvious that a railroad could often live on this short haul traffic, in spite of rate wars between terminals.

On the sea the business is all substantially between terminals, and if a line cannot get that business it has no intermediate business on which to live.

On the sea, then, conditions are not only intensely competitive, but the effects of competition are much more disastrous, and so it will be found that wherever rate wars on the sea are discussed from an impartial attitude, they are referred to as calamitous not only to the carriers, but to the public. The carrier which is defeated and driven out of the trade suffers. The victorious carrier suffers hardly less, because the victory has involved such a cutting of rates as to involve a loss.

And then ultimately comes the time for the public to suffer, and this the public does in various ways. Intense competition calls for severe economy. This tends to get the service down to the cheapest possible basis; cheapest as to quality of steamers, cheapest in respect to diminished sailings, and cheapest in respect to all that goes to the upkeep of the service, and the payment of the officers and crew. And, then, when the rate war is over, human nature being what it is, the victorious line will try to charge a rate which will not only be remunerative, but which will help to recoup the losses of the war. And this will go on until the artificial rate draws in new competitors and then the process will be repeated. In this condition of recurrent rate wars and of constant uncertainties, there is little inducement to maintain regular schedules of sailings, to improve the service or to maintain the existing service at anything better than the lowest grade the public will stand.

In respect to freight carriage, these rate wars disorganize conditions for the shippers as well as for the carriers, and there is constant uncertainty as to whether rates and sailings will be maintained so as to be available for future deliveries, and even uncertainty whether service to some less important ports will be maintained at all.

A vessel on the high seas cannot take courts and police with her, and so the ship's company must furnish its own government. It is equally true in the relations between vessels on the high seas that thus far no attempt has been made by international agreement to regulate ocean carriage, and so they have had presented to them the alternatives of self-government or anarchy. They have chosen self-government, and it will be shown that Agree-

ment AA was entered into for the purpose of legitimate self-government and not for the purpose of oppression. If any oppressive acts have been performed by the lines which were parties to Agreement AA, they were not a necessary incident to the combination. In fact, the important question here is not whether Agreement AA or any other of the long sequence of agreements was legal by the laws of the United States, but the underlying question is, whether under our laws ocean carriers have the right to combine in order to avoid rate wars.

In passing on Agreement AA it is also desirable to bear in mind that considerations which apply to a combination with respect to carrying freight do not necessarily apply to combinations respecting the carriage of passengers. The public interest is generally best served by keeping rates at the lowest possible figure when freight is to be carried. But the lowest rate is not necessarily most to the public interest in the carriage of passengers, particularly on the sea, where there are involved the elements of safety and the comfort and protection of the passengers.

It will hereafter be shown that on the two occasions when the United States Government conducted official investigations of combinations among ocean carriers analogous to the combination in this case, it was in both cases decided that the public interest required the maintenance of the combination. One of these decisions rested on the distinction between a freight combination and a passenger combination, and one rested on the distinction between combinations on the sea and combinations on the land.

**B.****Attitude and policy of Congress and of the United States Government toward combinations affecting carriage of passengers.**

The issue of reasonableness now before this Court is closely connected with the public policy of the United States with respect to combinations of this character. It is therefore material and necessary to examine the action taken by the United States Government on this subject—particularly the action taken by Congress.

**INTERSTATE COMMERCE ACT.**

I.—The passage of the Interstate Commerce Act in 1887 marked the culmination of an agitation to prevent improper combinations and improper practices on the part of transportation companies. That act related to the carriage of both passengers and property and it dealt with the subject of pools, but the only provision of the act prohibiting pools is that contained in the fifth section and this relates only to the pooling of freights. This indicates that as a matter of national policy in the control of transportation companies there are not the same objections with respect to a combination affecting the carriage of passengers as exists where the pool has to do with the carrying of freight.

**ANTI-TRUST ACT.**

II.—In the year 1890 the Fifty-first Congress took up generally the subject of anti-trust legislation, and the debates preliminary to the adoption of the Anti-Trust Act of that year covered the whole range of grievances at which the act was aimed, including freight pools. The legislative history of the act will be searched in vain for any



reference to grievances growing out of passenger combinations. This is merely negative testimony, and, if it stood alone it could not be given great weight, but where it accords with other expressions of the intentions of Congress and of other branches of the government of the United States it is significant.

#### INVESTIGATION BY INTERSTATE COMMERCE COMMISSION.

III.—In the year 1904, the Interstate Commerce Commission formally investigated and reported upon the immigrant pool between the railroads in respect to the inland carriage of immigrants by rail westbound from New York. *Re Transportation of Immigrants from New York* (10 Interstate Commerce Reports, 13).

The investigations of the commission, which are set forth in their report, showed that the railroads carrying immigrants westbound from New York had, for many years, been operating under a pooling agreement which, while not the same in form, was analogous in its essential principles to Agreement AA. The report of the commission indicates what the abuses were which led to the formation of that pool and shows that it was formed in part to protect the railroads against practices of agents and others which tended to break up the traffic and also in part to protect the immigrants. To avoid stating the conclusions of the Commission from any controversial standpoint, it is, perhaps, safest to quote the syllabus appearing in the official report of the case as showing just what was decided. It is as follows:

“Upon investigation by the Commission of practices applied in the westbound transportation of immigrants from New York and other Atlantic ports, it appeared, among

other things, that this immigrant traffic is divided between the carriers in agreed proportions based upon the proportion of the domestic passenger traffic done by each line; that, apparently, such a practice cannot be made effective in respect to any other class of passenger business; that the immigrants are carried from the seaboard at domestic published rates; and that the arrangements adopted by the carriers in connection with the immigration authorities of the United States for handling immigrant business have efficiently promoted the protection and greatly improved the treatment and comfort of immigrants. Held, That whether section 5 of the Act to regulate commerce, prohibiting carriers from entering into any contract, agreement or combination 'for the pooling of freights by different and competing railroads or to divide between them the aggregate or net proceeds of the earnings of such railroads or any portion thereof,' applies to such a division of passengers as has been shown to exist in this case is, at least, doubtful; that no discrimination as against individuals, classes or localities results from the handling by the carriers of this immigrant business at domestic published rates, and that there is no justification at this time for the issuance of any order in the premises."

Counsel for the Government in the present case noted their objection on the record when certain of the witnesses referred to this decision of the commission, on the ground that that decision was merely to the effect that the Interstate Commerce Act did not extend to that immigrant pool. That is not the point. The point is that the same immigrants who have crossed the Atlantic by lines which were parties to the Agreement AA have for years, on arrival at Ellis Island, been for-

warded to their destination by railroads operating under an agreement analogous in its essential principles and in its essential purposes to Agreement AA; that this has been done with the knowledge, consent and co-operation of the United States immigration authorities; that this railway pool has been investigated officially by a commission of the Federal Government which was expressly charged by law with the duty of making such investigations (see §14 Interstate Commerce Act), and which was composed of men of high standing, and of great experience in respect to matters of this character, and that this commission then reported officially that it was in the interest of the immigrant, and of the public that this steerage pool should continue.

#### INVESTIGATION AND REPORT BY HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES.

IV.—After the suit at bar was commenced, Congress made a most thorough investigation of the whole subject of steamship agreements and affiliations in the American foreign trade, under House Resolutions 525 and 587 of the House of Representatives of the Sixty-second Congress and 205 of the Sixty-third Congress.

By those resolutions, the standing committee of Congress on Merchant Marine and Fisheries was empowered and directed to make a complete and thorough investigation of the methods and practices of the various ship lines, both domestic and foreign, engaged in carrying our oversea or foreign commerce to learn "Whether any such ship lines have formed any agreements, understandings, working arrangements, conferences, pools or other combinations, among one another or with railroads \* \* \* for the purpose of fixing rates and tariffs \* \* \* or for the purpose of pool-

ing or dividing their earnings, losses or traffic, or for the purpose of preventing or destroying competition."

The testimony taken by that committee, and its report, comprising four printed volumes have now been published by the government. Without here attempting to describe one of the most thorough investigations which Congress has made for many years, it is sufficient to say that the committee conducted a nation wide, and in many respects a world wide, investigation; that it obtained documents and agreements from practically all the steamship companies; that it had before it, and frequently referred to, the Record in the case at bar; that it examined shippers and officers of land and ocean transportation companies from all parts of the country interested in traffic of every sort and representing all possible conflicts of interest which could arise in reference to the foreign and international commerce of the United States.

This Committee of twenty-one members were unanimous in their report, and the report states (Vol. 4, page 418) that those who had testified or communicated with the Committee were nearly unanimous in approval of the recommendations of the Committee.

As indicating the attention given by the Committee to the agreements relating to the passenger traffic between America and Europe, it is important to note that that is the first subject taken up in the committee's report, and the first fifty-one pages of the report are devoted to a statement and review of the facts. It appears from this report and from the testimony that the committee went over exactly the same ground as that covered by the testimony and exhibits here, and indeed had before it the testimony and exhibits in this suit, furnished by the Department of Justice. The

committee states its conclusions that "the steamship business differs essentially from that of the railroads" (p. 420). As one of the reasons for this difference the committee reports (p. 310):

"Railroads enjoy property rights acquired often at the expense of the state, operate by virtue of special privileges, and should, therefore, be held to the performance of the functions for which they were created. Steamship lines, on the other hand, are not tied like the railroads to a definite route of travel, *i. e.*, vessels are not fixtures in any trade and are not limited in their operation to any fixed line. They have received no public aid or franchise, are essentially enterprises of a private nature, and are not bound to maintain a definitely prescribed service. The vessels may come and go by whatever route or in whatever direction they please and the only incentive to engage in any particular trade is to develop that trade to a point where the profit will justify the operation of a regular and continuous service."

The committee reports (p. 415) that the facts which it has learned show that it is the almost universal practice of steamship lines engaging in the American foreign trade (and indeed in trade the world over), to operate under the terms of written agreements and conference arrangements which have, for their particular purpose, the regulation of competition through either (1) the fixing or regulation of rates; (2) apportionment of traffic; (3) pooling of earnings, or (4) meeting of competition.

As to the reason of these agreements the committee reports (p. 416):

"The entire history of steamship agreements shows that *in ocean commerce there is no happy medium between war and peace*

*when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement."* (Italics ours.)

This proceeding is brought to have Agreement AA cancelled on the ground that it constitutes an unreasonable restraint of trade; that is, that it tends to monopoly. But here is a report of an investigation by Congress of this very subject and, *inter alia*, of this very agreement, which results in finding that the prohibition of this and similar agreements would mean a monopoly more effective than any which could exist under the agreement.

On the same subject the committee reports (p. 416): "It is the view of the committee that open competition cannot be assured for any length of time by ordering existing agreements terminated." And the committee goes on to recommend that the steamship companies be allowed to enter into agreements such as Agreement AA, but that a commission be created (either an independent commission or an enlarged Interstate Commerce Commission), and that all the carriers be required to file with that Commission for approval all written agreements with other com-

panies, and that the commission be empowered to order cancelled such agreements or any parts of them which it may find discriminating or unfair or detrimental to the interests of the United States, and that the commission may be empowered to investigate complaints as to unreasonableness of rates.

The Congressional Committee had before it the blue books containing the report of the Royal Commission on shipping rings, which was presented to the British Parliament in 1909 (see page 4, Report). It received special reports from our consular and diplomatic officers everywhere. The Congressional Committee, therefore, studied the methods by which ocean commerce is carried on the world over and found that combinations between ocean carriers were practically universal. If Agreement AA were peculiar to this particular traffic, or to this particular time, a different situation might be presented. But it is not. It corresponds to the world wide method adopted for ocean carriage. It is idle to contend that such a world wide practice could have grown up out of anything less than the actual necessities of carriage on the sea or that it could have grown up merely in the interests of the carriers.

On this subject, the Congressional Committee reports (p. 415) "Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing disadvantages and abuses." The Committee recommends the latter course.

#### V.—POLICY OF THE UNITED STATES AS TO IMMIGRATION.

It is impossible to deal with the questions involved in this proceeding in the same way as



though the proceeding related to the transportation of merchandise. We are here considering the carriage of human beings. Where merchandise is being carried, safety is mainly a question of insurance rates and the quality of the service mainly affects prices and profits. Here safety means safety to life, and everything which affects the quality of the service involves the health and comfort of many human beings.

In the carriage of freight, the thing sought is to accomplish all possible cheapening of the rate, and anything which may stand in the way of that cheapening is apt to be regarded as contrary to the public policy. In the carriage of passengers, the cheapness of the fare is not the most important consideration, and a combination which would be against public policy, if freight were involved, may be in accordance with public policy if it tends to promote safety and health and the self-respect and good condition of those who travel. And it is worthy of consideration that, generally speaking, the lower the rate the more undesirable as a class do the immigrants become.

In this connection, it is important to note that Agreement AA applies to what is probably the greatest immigrant route known in historic times. The report of the Congressional Committee above referred to (p. 21) comments on the fact that of 2,165,600 passengers who were carried in the year 1912 on the North Atlantic trunk route, 1,539,200 were third class. The last two reports of the Commissioner General of Immigration show that from 84% to 86% of all the immigrants to the United States came in at North Atlantic ports.

It is not practicable here to trace, except in the briefest manner, the development of the immigration policy of the United States: At first the States felt compelled to supervise and restrict

immigration; then, in 1882, the Federal Government entered upon the work and by a series of statutes, particularly those of 1891, 1903 and 1907, our national system has been developed and our national policy declared.

The present immigration law makes not less than twenty-five different classes of immigrants inadmissible. This list of the inadmissible classes has grown as our immigration policy has developed, and the tendency of this development has been toward preventing and discouraging the immigration of those aliens who have been, or are likely to be, unsuccessful in earning their living. Thus, the last immigration act added to the list of those previously excluded all aliens who were imbeciles or feeble minded; all those who, though not suffering from a disease, in itself necessitating exclusion, are certified by the examining surgeon as being mentally or physically defective where such defect may affect the ability to earn a living. The law prohibits carriers from encouraging immigration and debarred assisted immigrants (Immigration Act of 1907, Sections 2 and 7).

As previously noted, the conclusion of the Congressional Committee was that either one of two alternatives must be accepted in this sea transportation; that is, there must be combination between the lines or there must be rate war. The committee reported that "the entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade" (Report, p. 416). The Government is here seeking to prohibit combination in respect to the carrying of this great body of immigrants. What, then, will be the effect of rate war on our national immigration policy?

Mr. Lister, who is at the head of the passenger business of the Cunard line and who came to New York to be a witness in this case, testified that in the rate war of 1904 the third class rate from Europe to America dropped to \$7 (13 R., 1529). Being asked whether he could state from his experience what effect a rate war has on the character of immigrants from Europe, Mr. Lister testified (13 R., 1514-1515):

“Yes. You get during the rate war the dirty people that the steamship companies—I don’t say how much or all—but it is what we are liable to get—the very people who in times of regular stable business we are keeping out. A rate war brings up again all these undesirable agents. That is the first thing it does. Then they encourage every one whatever who has got a few shillings to go to America. The natural result is that the steamship companies might be inclined to accept as many passengers as they can to make both ends meet, and the likelihood of the United States being afflicted with a very, very large number, an enormous number, of undesirable passengers.”

Again, he testified on the same subject (13 R., 1530):

“The man that comes over at \$7 in a rate war time is a creation of agents whom the steamship companies at other times hear nothing of and the bulk of people that take advantage of the \$7 rate are drawn from very, very narrow limits. The bulk of them are East End London passengers.”

He went on to testify (13 R., 1557-1558) that at the time of the rate war of 1904 he was the head of the third class department of the Cunard line,

and that he used to board every ship; that during the war the third class passengers differed to a very marked degree from the average Cunard passengers:

“At the rate war of 1904, what happened was this: directly the rates were reduced, certain agents who were in touch, close touch, with the lowest class of passengers drawn from the East End, if I might say, the slums of London, and from such places as the lowest quarters of Leeds and lowest quarter of Manchester, and the big towns, they used to secure in advance large numbers of berths in each ship, and they used to send in as many as a hundred at a time of advice slips of the bookings of these passengers. When the passengers came along we found out that they were practically the very poorest class of men, still, having been booked we were bound to accept them.

“Q. Did you personally see the passengers who embarked at that time? A. Personally. I have a very vivid recollection of what was happening at that time, I think. A class entirely different.”

There was no contradiction of Mr. Lister's testimony in this regard, and it must be obvious that a rate war would tend to induce just such an immigration as he describes.

There are few subjects of Federal jurisdiction which now receive more attention than this subject of immigration, and it cannot be necessary to argue the proposition that our national policy in this regard does not favor transportation conditions which would invite such immigrants as come during the rate wars.

Another feature of our immigration policy bearing on this matter is that which relates to the

part played by steamship officers and agents in sifting, inspecting and supervising immigrants.

The Immigration Act of 1903 practically threw on the steamship companies the obligation to determine whether or not immigrants are suffering from excludable disease, and punished the steamship company with a fine of \$100 in every case where it accepted as a passenger an alien afflicted with one of these diseases where a competent medical examination at the time of foreign embarkation might have detected the existence of the disease (Sec. 9). Persons brought in violation of law are required to be cared for and returned whence they came at the expense of the steamship company (Sections 19, 20 and 21). The officers of the ship are required to make a physical and oral examination of the aliens aboard on their arrival here and to certify the result of the examination on oath to the Government. The immigration act bristles with civil and criminal penalties which may be inflicted on officers and agents of the steamships who shall fail to assist the Government in carrying out the immigration laws. For example, a captain or agent may be fined \$1,000 or imprisoned for a year under Section 18, if he is negligent about landing an alien at any place except that designated by the immigration officers. The whole policy of the immigration act is to require ship's officers and agents to be skillful and responsible in respect to the administration of the immigration law and to make them the first, and, perhaps, the principal, agents of the Government in carrying out a strict immigration policy. This requires a trained, experienced and disciplined force and a stable business. The owner of a steamer, trading here this year and next year at the antipodes, could not effectively carry out our immigration laws. The efforts of the steam-

ship companies in this regard will be discussed later, but it must be clear that the necessary discipline and precautions cannot be maintained under rate war conditions.

As a matter of first impression, the words "combination" and "pool" are often associated with the idea of monopoly; and this impression may well have grown up from the fact that for the last twenty-eight years freight pools have been illegal under Section 5 of the Interstate Commerce Act. But, disregarding now the bad company in which these words have sometimes been found, and studying the facts relating to this combination, it is a matter of great importance—it is submitted of controlling importance—that when a passenger combination like this was officially investigated ten years ago by the Interstate Commerce Commission, it was found to be in the interest of the public that it should continue, and that when this very combination under Agreement AA was investigated by Congress, it was found in the public interest that combinations like this should not be prohibited but should be allowed to continue subject to certain supervisory powers by a commission.

The conclusions reached by the Interstate Commerce Commission in 1904 and by the Committee of Congress in 1914 do not represent the work of advocates for the steamship companies. In both cases, the investigation was made by appropriate representatives of the Federal Government and was made in the public interest. It cannot well be urged that our national policy is opposed to this combination when two official bodies of the Federal Government, both of which were qualified and empowered to pass on the subject, have concluded to the contrary.

There is no suggestion in this case of any

attempt on the part of the defendant lines to circumvent any policy of the United States, so this proceeding is not complicated by any considerations of that character.

It is not claimed by these defendants that ocean carriers who are subject to the Anti-Trust Act may legally combine for the purpose of destroying a competitor, but it is claimed that under the laws of the United States they may legally combine for the purpose of avoiding rate wars and to avoid the evil consequences to themselves, to their passengers and to the public which would result from unrestricted, unregulated and destructive competition, to which, as already pointed out, trade on the ocean is peculiarly subject and from which its only protection in the absence of international agreement must be found in reasonable self-government. It is claimed for these defendants that Agreement AA is such a measure to prevent rate wars; that it was not intended to destroy competitors; that it has not worked the destruction of competitors, and that it has not caused arbitrary and excessive rates, but that, on the other hand, it has furnished to the public regular sailings and facilities for ocean travel better and safer than any which have ever previously existed and that this service is rendered not only at a reasonable rate but at a rate which is not more than barely remunerative to the carrier.

### C.

**The reasons and conditions which led up to the making of Agreement AA.**

It appears from the testimony that a series of agreements and understandings have been entered



into from time to time between the North Atlantic passenger lines. In 1892, the written agreement known as the "NDLV" was made by the Continental Lines, and since that date a series of agreements have been made from time to time, intervals of rate war intervening between the periods when these agreements were in existence. It thus appears that agreement AA was not a peculiar or isolated agreement.

The testimony in this case and the evidence before the Congressional Committee, as well as the report of that committee, show that combinations between competing steamship lines are almost universal, not only in ocean commerce between the United States and other nations but also in the ocean commerce between other countries the world over; that they have grown out of the intense competition on the seas and that these combinations have been found necessary to avoid the destruction of weaker lines and to avoid the injury and demoralization of service and business which have been caused by rate wars. The conclusions of the Congressional Committee to this effect have already been quoted and attention has also been called to the effect of rate wars in stirring up the worst class of agents here and abroad and in attracting the least desirable class of passengers. Mr. Hannah, of Montreal, who had been in the steamship business forty-five years, first with the Inman Line in New York, and then with the Allan Line in Montreal, testified that he believed it absolutely necessary that there should be understandings among steamship lines by way of regulating competition (13 Rec., 1436). On being asked why from his experience he considered this necessary he went on to testify as to the lines that had perished in the trans-Atlantic

trade: "So there are five lines that perished in the trans-Atlantic trade; five out of eight British lines that did not survive" (13 Rec., 1436) and that this was due to no cause except unrestricted competition. Mr. Cauty, of Liverpool, who since 1886 has been successively connected with the Inman, American and White Star Lines, testified on this subject in Liverpool as follows (12 Rec., 1091):

"From 1880 to 1888 various agreements were in existence, but from 1889 to 1895 was a very strenuous time in the North Atlantic trade. All agreements went by the board, and this period was one of keen competition between all the Atlantic lines. Each line did what they thought best, and rates were down to an absolutely unremunerative level."

He went on to testify that at the time of these rate wars the rates went down to £2 and he thought down to 30 shillings. He added:

"I think the result of this competition is very instructive, because if we look at the list of companies who were engaged in the Atlantic trade in 1880 and those who were left in after this rate war, we find there were a good many names missing. The Inman Line went into liquidation. The Beaver Line got into very serious difficulties, and was subsequently bought up. The Guion Line and the National Line went out of the business. The Warren Line, started carrying passengers, but also went out of business, and the State Line was subsequently amalgamated with the Allan. All these troubles arose, I may say, during those six years or thereabouts, and I think the lesson we have to learn from them is that if these conditions had been continued, they had only to be continued long enough for the At-

lantic travel and the whole Atlantic trade to be left in the hands of one or two of the strongest companies." (12 R., 1091-1092.)

Similar statements can be found in the testimony of almost all of the witnesses who were examined on this general subject. For example, Mr. Oscar L. Richard, who was called by the Government, testified (12 R., 813) that he did not think steamship lines could exist without some arrangement between themselves.

Mr. Lister of the Cunard Line testified (13 R., 1517-1518) that under present conditions it is absolutely impossible to maintain a passenger line from Europe to the United States which shall comply with the requirements of statute in England and the United States and with the demands of the public, unless the passenger rates are practically stable, and that it is impossible to maintain stable rates without agreements between the lines.

Mr. Franklin, vice-president of the International Mercantile Marine Company, testified to the same effect (13 R., 1810-1811). He also testified (13 R., 1807-1808) as to the conditions affecting American ships in this North Atlantic traffic, and said that an American ship would be at a much greater disadvantage without such agreements than a foreign ship would be.

#### D.

#### Provisions of Agreement AA.

The report of the Congressional Committee contains (at pages 31 to 33) a condensed analysis of the provisions of agreement AA. This analysis is given verbatim below, as it is thought that this will particularly aid the court, and that such

a statement will not be colored by any desire to make the terms of the agreement seem more favorable to the position of the lines than they are in fact.

"1. Agreement AA.—This agreement was entered into for a term extending from February 5, 1908, to February 28, 1911 (then to continue from year to year unless discontinued) by the Allan Line, the Anchor Line, the Cunard Steamship Co., the Hamburg-American Line, the North German Lloyd, the Holland-American Line, the Red Star Line, the International Mercantile Marine Co.'s Lines (except the Red Star Line), and the Canadian Pacific Railway Co. (Atlantic Steamship Lines). It will be observed that the above list includes all of the N. D. L. V. Lines.

According to the terms of the contract the following is provided:

(1) The companies guarantee to each other certain designated percentage allotments of the total steerage traffic forwarded by the parties from all European ports to and via the United States and Canada and vice versa, in vessels owned, leased, chartered, or controlled by them without regard to the flag. Italian and Oriental passengers, however, forwarded by direct steamers through the Straits of Gibraltar, are excepted. (This class of passenger traffic is governed by other agreements.) The percentage allotment of each line's business is specified both in the westbound and the eastbound traffic as follows:

For the westbound traffic:

Allan Line (United States services) .....	0.62	Red Star Line .....	9.71
Cunard Line .....	13.75	White Star Line.....	8.60
Hamburg-American .....	19.61	American Line .....	6.68
Holland-American .....	6.63	Dominion Line.....	6.47
Anchor Line .....	3.40		
North German Lloyd .....	26.53		100.00

## For the eastbound traffic:

Allan Line (Canadian services including Portland in winter).....	4.95	Red Star Line.....	8.56
Anchor Line .....	3.93	White Star Line.....	15.49
Cunard Line (Liverpool services) .....	12.77	American Line .....	8.72
Cunard Fiume - Trieste Line .....	2.35	Southampton .....	6.74
Hamburg-American .....	12.35	Liverpool .....	1.98
Holland-American .....	6.10	Dominion Line .....	1.50
North German Lloyd .....	18.79	Canadian Pacific Ry. Co. (Atlantic Steamship Lines) .....	4.49
			<hr/> 100.00

(2) Lines whose steerage transportation in a year exceeds in point of numbers the proportions fixed must pay a compensation price of £4 for each passenger carried in excess of the established proportion to the lines which have not reached their participation quota; and such payment is to be made in proportion to the number of steeragers which each line is short. This compensation feature is declared in the agreement to be 'one of the main features of the entire contract.' Compensation prices can be advanced or lowered only by a majority of the lines, representing at least 75 per cent. of the shares fixed in the allotted percentages.

(3) Each line undertakes to arrange its service in such a manner that the number of steeragers which it actually carries corresponds as nearly as possible to the number allotted to it by the contract.

(4) No line has the right to alter its steerage and second-class cabin rates without having previously informed the Secretary of the Conference. Unless there is a second-class rate agreement, the lowest second-class cabin rate of any line westbound must be at least £2, and eastbound at least \$10 higher than the highest normal third-class rates of the respective steamers.

(5) The lines agree to pay certain prescribed commissions to the agents.

(6) All advertising and printed matter sent to the agents must be submitted to the Secretary of the Conference. The conduct of the agents is also carefully regulated.

(7) Compensation accounts are prepared monthly by the Secretary, and final settlement is made at the end of each calendar year on the basis of the compensation account prepared by the Secretary, and objections to the correctness of the accounts form no release from obligations.

(8) Differences arising between the lines are settled by arbitration, and the opinion of the arbitrators has the force of a legal judgment.

(9) The resolutions of the Continental Conference and the North Atlantic Conference in New York are not binding upon the lines if the same are directly opposed to or in contradiction to the provisions of the contract.

(10) The Hamburg-American Line and the North German Lloyd will use their efforts to arrange that the passengers of the non-German lines may pass the Silesian, Saxon and German frontiers.

(11) Agents of the lines which are parties to the agreement shall not interest themselves in the booking of passengers for new outside competing lines.

(12) For each infraction of the terms of this agreement a penalty of £250 is imposed, and in case of willful infraction £2,500."

**E.**

**The actual effect of Agreement AA on the carriage of steerage passengers.**

**1.—AGREEMENT AA HAS NOT PREVENTED  
COMPETITION.**

The Government in its brief (page 84-90) contends that the Agreement AA results in the suppression of competition with respect to the service rendered by the defendants. The evidence in the case quite conclusively refutes this contention and shows that competition in service among the parties to the agreement has been as keen, if not keener, since the agreement was made than it was before. It has worked out in actual practice that a line getting more business than its percental allotment demands, and upon the next readjustment and renewal of the agreement, receives a greater percentage based upon the business which it has shown itself able to obtain, and that there is thus a continuous incentive to each line to offer better service and thus obtain more passengers. As a matter of fact, the percentage of the Cunard Line was increased for this very reason, as will appear from the extracts from the testimony hereafter quoted. Indeed, it is a matter of almost common knowledge that at no time in the history of the carrying trade on the ocean has there been greater competition than there has been during the period covered by Agreement AA and this competition has been evidenced not only in the quality and number of new ships, but also in the fittings, food, appointments, service and everything which goes to attract passengers.

Mr. Strauss, a witness called by the Government, testified (12 R., 776) :



"We are competing just as much to-day as we ever did in our lives for every passenger we can get."

Mr. Cauty, of the White Star Line, testified (12 R., 1088-1089):

"In the working of a pool a line has to carry approximately its full percentage, and if any line was to draw behind in the race with regard to making its ships attractive, drawing the passengers, it would undoubtedly suffer. In the first place it would suffer in its revenue, falling behind in its percentage. It would ultimately have to reduce its rates. The pool in no case is made for a great period of years—this five years' agreement we have now is the longest period it has been made for, and any line that systematically shows its inability to carry its percentage would have a very difficult case to meet when the renewal of this pool came up for consideration, and I think this is evidenced by the condition on the North Atlantic to-day, that all the lines fully realize this. You have only to look at the ships we have on the Atlantic and the accommodation we provide, the improved vitualling we give the passengers, to realize how much the conditions of the passenger have been ameliorated during the recent years in crossing the Atlantic. That I think must be clearly laid down to the wish of each line to keep well up to its competitor."

Mr. Lister, of the Cunard Line, testified (13 R., 1499) that the provisions of Agreement AA "have not prevented competition in the least. The lines are just as eager now to get passengers as they were before," that *the percentages provided in Agreement AA have been subject to change as affected by the experience of the lines as they*

*proceeded under it; that the Cunard Company has demanded and received more than when the agreement started, because the line showed it was able to get it.*

He said (13 R., 1500-1502): "*We have demanded more than when we started, because we showed that we were able to get it. We simply went out to get the business just as we did before Agreement 'AA' was formed,*" and as a result the Cunard percentage was increased; that this change was made in the Cunard percentage because the line had shown that the percentage it made at the outset was not sufficient. "We proved that we were able to command a larger, and carry a larger, number of passengers, and obtained a larger number of passengers than the percentage provided." This was done not by argument, but by activity in the trade, by getting the business. The Cunard Company got more passengers by reason of its activity, "We never slackened off the least bit; the work went on just as it had gone before \* \* \* as though there had been no 'AA' Agreement at all." There has been active rivalry in the construction of new steamers since 1908 and there is this rivalry now. "Everybody is adding to its fleet just the same way it did before." The Cunard Company "have actually ordered built, already built or ordered, five large new steamers for the Atlantic trade" and everyone of the steamship companies, except the American Line, has added new boats to its fleet since 1908, or is adding them.

Mr. Philip A. S. Franklin testified on the same subject when asked what the effect of Agreement AA is as regards competition (13 R., 1802-1803): "Competition is just as keen as it was before" \* \* \* . "Each line is just as anxious to secure as many passengers as they possibly

can," and that competition is just as much with the lines in the Conference as with anybody else.

2.—EFFECT OF AGREEMENT AA ON LINES NOT  
ORIGINALLY PARTIES TO THE AGREEMENT.

The allegations of the petition in respect to the effect of Agreement AA on outside lines were not proved.

With respect to the Russian Volunteer Fleet, the Government offered very little which could be called evidence, and such as it was it did not show that that company had been driven out of business by any action taken by the lines which were parties to AA. Such information as there was on the subject indicated that the company had abandoned the business from causes entirely foreign to Agreement AA or any action by the defendant lines. A letter from Admiral Radloff, president of the Russian Volunteer Fleet, was marked in evidence. After referring to a report that that line had "been driven out of business" by the action of the pool, he said: "We beg to say that the above statement, as far as it concerns the Volunteer Fleet, is not correct, as the Committee of the Russian Volunteer Fleet had decided to suspend their Libau-New York line for reasons of their own that had nothing in common with the attitude taken by the Pool" (Deft.'s Ex. 3, read into testimony at p. 820, 12 R.).

So far as concerns the Russian American Line, there was no proof that it had been forced to become a member of the combination. It did so voluntarily.

As regards the Uranium Line: A great deal of testimony was offered by the Government on the subject of "fighting ships," which were run in opposition to certain of the ships of that line. Without here discussing the subject of "fighting

ships," (these defendants do not contend in this proceeding for any right to run or participate in the running of "fighting ships") a study of the returns from the business of the Uranium Company will show that, considering its small and in many respects inferior fleet and its financial vicissitudes, its carryings compare well with those of the lines which had to go to the expense of maintaining expensive fleets and permanent service. Moreover that line appears to be run by the Canadian Northern Railway Co. of Canada as a feeder to its colonization projects in Canada (12 R., 1091-1092).

### 3.—AGREEMENT AA HAS NOT RESULTED IN THE CHARGING OF ARBITRARY OR EXCESSIVE RATES.

In the petition the Government alleged that the rates charged by defendants were excessive (1 R., 32). The evidence to the contrary was so overwhelming and conclusive that the Government now, in its brief, practically abandons that contention or, at best, gives it but half-hearted support (Government's Brief, pp. 115-117). However, the extremely low rates charged, rates lower, as we shall show, than are charged by the Government itself in carrying the same class of passengers, are so clearly the effect of the stability resulting from Agreement AA that we shall briefly refer to the evidence on that branch of the case.

Mr. Richard, who was called by the Government and who testified that he had been in the steamship business for forty years, was asked whether, in his opinion, the steerage rates are or are not reasonable, and he testified that they are very reasonable (12 R., 813). He said that when he first went into the business forty years ago the steerage rate was \$30 to Hamburg, and \$40 from

Hamburg, in gold; "it made a higher rate in currency."

Mr. Hannah (formerly of the Inman and later of the Allan Line) testified (13 R., 1439-1446) that in 1868 the rates were as high as \$40; that in 1869 the Cunard rate was \$40 for British business and the Inman Line rate was \$37; the Continental rate \$45 and the Scandinavian rate was \$50, although, as Mr. Hannah testified, "The cost of a steamer to-day is four times as great as the cost of the ships that were running then," and operating expenses of every kind have increased greatly.

After having been amply qualified as an unprejudiced expert, Mr. Hannah was asked whether or not the current steerage rates are reasonable rates, and he answered: "I think they are very reasonable considering what is done for the passengers. The distance the passenger is carried is 3,000 miles; the highest charge is \$31.25. This is a small fraction over a cent a mile, and the companies feed the passengers during that time and provide him with medicine if he is sick, provide him with a doctor and charge him one cent a mile. I don't know of any traveling in the world that is as cheap as that by land or sea," and that this cost is "relatively very much lower than it once was in view of the accommodations provided."

As showing the increasing expense to the carrier, Mr. Hannah went on to testify (13 R., 1446-1449) that by reason of the recent laws of the United States and of Canada, "The ships cannot carry anything like the same number of passengers as they could twenty years ago. We could not carry any more, for instance, say 950 in one of our ships that are 11,000 tons, when, as I have already said, in steamers of 3,500 or 4,000 tons we have carried 1,400

passengers, so that that is the difference between ships twenty-five or thirty years ago and the ships of to-day." He said that any reasonable person examining the accommodations provided for passengers could not form any other conclusion than that the steerage rates are entirely reasonable; that the wages of crews have risen 20% in the last twenty-five years and the cost of provisions 40%; that the cost of coal is nearly double what it was twenty-five years ago, and shore expenses, *e. g.*, office, pier rentals and stevedoring had also greatly increased.

As showing the viewpoint and qualifications of Mr. Hannah, it is worth noting that when he testified he was about to retire from the steamship business after having devoted his whole active life to that business.

The testimony of Mr. Drake, Vice-President of the Panama R. R. Company, was very significant as showing the cheapness of the North Atlantic steerage rates which have prevailed since Agreement AA was made (13 R., 1662, 1665-1666). *He testified that his company was owned by the United States Government; that it operates a line of steamers from New York to Colon in connection with its railroad; that the steerage rate from New York to the Isthmus was \$30, and that the distance was 1,985 miles, and that this rate was at times remunerative and at other times not. Considering the distance traversed by the North Atlantic passenger ships, the steerage rate on the North Atlantic ought to be more than \$50 if the Panama rate is taken as a fair standard, to say nothing of the difference between the cost of the Panama ships and the cost of the modern passenger ships on the North Atlantic.*

*In other words, the Government, which is the petitioner herein, has on its own line established*

*a steorage rate which it finds not always remunerative, yet if this Government rate were applied to the steorage business of the defendants, the prevailing rate would be increased from about \$32 to over \$50. And yet the Government is here contending that the effect of Agreement AA has been to subject the public to arbitrary and excessive rates.*

Mr. Lister testified (13 R., 1506-1510) that comparing steorage rates before and after the making of Agreement "AA" there has been not more than a very little variation; that some ships crossing the Atlantic, as the "Lusitania" and "Mauretania," were able to command a higher rate, but, on the whole, there had been very little variation; that about 1897 the Cunard Company was paying 11 or 12 shillings a ton for coal, where it is costing now at least 18 shillings; and in 1912 cost 21 shillings; and that at the same time the steamers of to-day consumed a great deal more coal than older and slower boats did; that nearly every item in the cost of provisions has gone up; that a ship which could have been built possibly two years ago for £200,000 would probably cost to-day £250,000.

Mr. Franklin testified (13 R., 1803, 1828) that steorage rates had been practically the same since 1902 (except during periods of rate wars), while the cost of operation had increased tremendously; that the rates will vary on the ships, even of a particular line, so that the line may have a minimum third class rate, but it will charge a little more for a faster and better steamer.

Being asked as to existing rates, Mr. Franklin testified, "I consider them extremely reasonable, and I think the recent increased cost justifies a further increase in the rate" (13 R., 1829).



Mr. Lister testified (13 R., 1512-1514) that there had been a great deal of expense thrown upon the Cunard Company and other companies under the United States Immigration Act, and in that connection he described the precautions which the company adopted to control its agents and to avoid taking on board immigrants who would not be admissible. He testified (13 R., 1518-1520) that the third class rates were reasonable, and, going on to explain the increase in expenses, he testified that all the steamers now in use were larger consumers of coal than a few years ago, that the Cunard Company has steamers now with a speed equal to twice the average speed of its steamers twenty years ago, and that stevedoring charges and pier rates are increasing everywhere.

Mr. Franklin testified (13 R., 1803-1804) that in the carriage of passengers, "The cost of operation has increased in the last three years tremendously" \* \* \* . "In the first place, the cost of construction is greatly increased. The wages have all been increased, both ashore and afloat. The cost of all food stuffs, supplies, coal, oils, everything that a steamer consumes in the conduct of transportation have all increased."

This subject of reasonableness of rates received much attention during the hearings, but there was no evidence offered to contradict the statements made by the witnesses who have been quoted above. To present the subject to the court in another aspect, the Cunard Company was at considerable pains to show the facts in its own financial history which demonstrate that the steerage rates which have been charged since 1908 have not been arbitrary or excessive.

For that purpose Mr. Lister, the officer of the

company most familiar with all the bearings of its passenger business, came to the United States from England for the express purpose of testifying in this proceeding (13 R., 1493). He brought and referred to the necessary statements bearing on this subject. He testified (13 R., 1515) that between 80% and 90% of all the tonnage of the Cunard Company comes to ports of the United States and it was testified by many of the witnesses that the Cunard ships, especially the larger ones, carried very little cargo. It follows from these facts that the profits of the Cunard Company would be especially affected by the return from this passenger business on the North Atlantic, and a comparison of the relative earnings of the company will be especially illuminating on the question of whether or not since the making of Agreement AA an excessive rate has been charged for this largest part of the company's business.

The facts on this subject are (13 R., 1515, 1552-1557):

For the last thirty years the average dividends paid by the Cunard Company were  $2\frac{81}{100}\%$ ; that for the past ten years they were  $3\frac{30}{100}\%$ , and that since February, 1908, they were  $2\frac{75}{100}\%$ . For the purpose of showing that these profits were not computed on any fictitious capitalization, it was proved that there was no water in the company's stock, and it was also proved that there was no fictitious writing off of earnings into capital account, and that the amount written off for depreciation only sufficed to cover what had actually been found by experience to be sufficient to cover loss from depreciation.

It was probably not necessary to prove that the Cunard Company having been engaged in carry-

ing passengers on the North Atlantic route for seventy years might be presumed to be able to conduct its business without unnecessary waste. It being then recognized that the income from this steerage business on the North Atlantic is its largest source of income, that its dividends are computed on an actual capital (its capital stock is estimated to be worth, if its assets were distributed, 150 on a par of 100) and without any unnecessary writing off, it is most significant that, since the making of Agreement AA, the average dividends have been lower than the average for either the past ten years or for the past thirty years, that is, 2 75/100% on par value and 1 83/100% on market value.

This subject of rates cannot be fully considered without taking into account what steerage passengers now get for their money, as compared with what they got say twenty-five years ago. The improvement in the service commenced a number of years before 1908, but the era of improved steerage service has been the era of combinations between ocean carriers; that is, it has been in the period elapsed since say 1892; and, while all this improvement cannot be credited to Agreement AA, most of it can be credited to that willingness to co-operate which has made the business of carrying passengers a stable one, and not a wild competitive venture.

#### 4.—IMPROVEMENT OF PASSENGER SERVICE, PARTICULARLY OF THIRD CLASS SERVICE.

As showing the changes in third class service which have taken place in the last twenty years, Mr. Kellerman, manager of the third class department of the Cunard Line, testified (13 R., 1569-1572) first as to the conditions twenty years ago. He said, "Steerage passengers

were accommodated in big, open compartments, fitted with bunks, three or four tiers high, five or six berths wide, so that in many places people occupying the inner berth had to crawl over the outer berth to get into their bunks. And the bedding and eating utensils had to be provided by the passenger himself, at his own expense." That the number of bunks ran all the way up to two or three hundred in a big compartment; that the passenger himself had to take charge of the bedding of his bunk—"He brought it on board and took it from board if he wanted it or threw it overboard if he didn't want it. He had to care for it on the voyage and in fact it was all left in his charge. He had all to do with it."

In respect to the system pursued at that time in giving the third class passengers their food, Mr. Kellermann testified (13 R., 1573-1575): "In those days the food was brought into each compartment by a steward, who called the passengers around him with their utensils and he measured out whatever stuff they wanted from a big receptacle, a can, tin can or iron can, and dealt it out to each passenger, and had a basket or—yes, a big basket of bread and gave them a couple slices of bread and let them go about their business." That the passengers received this food in their own utensils and that then they had to go and sit down wherever they could to eat it. "Some sat down on their bunks, some on their trunks, different places; stairways, wherever they could find a place to sit down and eat," and that each passenger had to keep his own utensils clean; and he went on and described toilet and sanitary arrangements in those days—"In fact they had no privacy."

Describing, then, the present arrangements in the better class of passenger ships running to

the port of New York, Mr. Kellerman testified (13 R., 1573) that at present "the third class accommodations are arranged into rooms containing two, four and six berths. The mattress, pillows, blankets, whatever necessary are furnished by the company, free of charge to the passenger, and in each room there is besides a washstand, a can of water to wash in, water carafe, glasses." That in these rooms there is "a towel and a settee; they can sit down on it when they are undressing or dressing, and each room can be locked; there is a key for each room and it can be locked to secure privacy. Besides this, there is on the modern steamers a shower bath." That these rooms are now taken care of by a large number of stewards and stewardesses provided by the company, that the rooms are kept clean and attended to by the stewards' department on just the same system as is pursued in the first and second cabin, except that the furnishings are different.

Describing, then, the present system as to serving food, Mr. Kellerman testified (13 R., 1574): "The better ships nowadays have big dining rooms fitted with long or small tables and with revolving chairs. The tables are set by the stewards" \* \* \* "the company's stewards; and the passengers sit down at the tables and are served there by the company's stewards." That, so far as the arrangement of tables and chairs is concerned, it is practically the same as that prevailing in the first and second cabin, and that the utensils are provided by the company and taken care of by the stewards, and that the third class passengers are not required to take care of them any more than the first or second cabin passengers.

As to provisions for the comfort and amuse-

ment of the third class passengers, he testified (13 R., 1574-1575), "They have, for instance, in the dining room, a piano which they use for concert and entertainment during the afternoon and evening when they are not using the dining room for eating purposes. They have smoking rooms for the men and social rooms for the womenfolk, large open and closed promenade decks, with settees and benches along where the passengers can either sit down or promenade as they desire. Besides that for the passengers' comfort are shower baths, hot and cold shower baths, lavatories built according to the latest sanitary improvements, with running water." \* \* \* "There is a wash room, where women with children on board can go and wash the children's clothes whenever they want to." That in the afternoon and evening our third class passengers get together in the dining room and have concerts and entertainments of various sorts.

Mr. Kellerman produced sample bills of fare in the third cabin of one of the smaller Cunard steamers (13 R., 1576). These bills of fare, fourteen in number, were offered in evidence as model exhibits, though not printed in the record. They were used on the S. S. "Laconia" for the week beginning Sunday, January 21, 1912. Each bill was printed in English and in Swedish (hence the fourteen copies) and they will be produced for examination if the court desires. Without here attempting to give particulars, these bills of fare indicate that the nature of the food, its abundance and its variety, was at least equal to what would be found on the table of a well-to-do family in the United States. As to the quality of the food, Mr. Kellermann testified that it was all taken from the

general stores from which all the food on the ship was taken (13 R., 1578).

On this subject of improved service Mr. Lister testified (13 R., 1502) that the effect of the making of Agreement AA was, "That with the AA agreement behind them, the steamship companies felt that they could embark out and build new ships. It is perfectly obvious that if there was no stability in the business we could not embark out and put a lot of capital in new ships." It was the stability of the business that justified the risk involved in these large investments.

Mr. Lister went on to testify (13 R., 1503-1504) that since the making of Agreement AA, the other lines that were parties to the agreement had gone on adding new ships to their fleet, and he then described substantially as Mr. Kellermann had done, the improvements in third class accommodations. As to the food, he said, "There is only one store on the ship in which all the eatables are stored, and the food comes from the same stores. I don't want you to think that we gave them grouse and oysters and things of that kind, but what they do get is cooked from the same stuff that is cooked up for the saloon passengers \* \* \* and the same quality of food."

He said (13 R., 1505), "The third class passenger now is not the third class passenger that he was twenty years ago. Now he is just as keen as the saloon passenger in getting the very best that can be provided for him, and so far as that is concerned, certain passengers will pay for the best, and willingly. I think I am right in saying that our two fastest boats, the 'Lusitania' and 'Mauretania,' are our most popular third class ships, despite the fact that we charge a little more for



them in return for the extra speed we give them than the other ships of our fleet."

Mr. Lister testified (13 R., 1506) that there never was a time when a third class passenger received more for his money than he does now, and that he is getting more all the while.

Mr. Franklin testified as to the same improvements in third class service; that is, as to the difference in the food and the service of food, difference in the rooms and in the improved type of steamers (13 R., 1804-1805).

#### 5.—INCREASED SAFETY.

The subject of improvement in steamship construction and appliances which afford increased safety is too familiar a one to require much discussion. Mr. Lister testified (13 R., 1510-1511) briefly as to the increased size, cost, and the improved construction of ships; also to the substitution of twin screws for single screws; the use of submarine signals; the installation of wireless apparatus, and the substitution of electric lights for the old oil lamps. All these constitute improved machinery, which is expensive and efficient. But travel at sea cannot be made safe merely by mechanical devices, for there is too much play for the elements of personal skill and personal discipline.

Under present conditions, it is probable that the greatest peril of the sea grows out of the tendency of ship's officers to grow careless with respect to a danger after it has become familiar. And conversely, the best protection at sea is a careful watchfulness by skillful men with respect to familiar dangers, or, in other words, the maintenance of discipline and skill.

The expensive improvements which appear in the new passenger ships are not due to the mak-

ing of Agreement AA alone, but, as previously noted, these improvements and the increased expense they involved were made possible by the willingness of the steamship companies to combine for self-government, as that willingness is shown by Agreement AA and earlier agreements.

These combinations have also had a direct effect in making possible the discipline without which travel by sea cannot be made safe. Capt. Barr, the Commodore of the Cunard fleet, who has been for twenty-seven years in its service, testified on this subject (13 R., 1648-1652). He said that after thirteen years' general experience at sea, he joined the Cunard Company as a fourth officer, and rose by promotion through six intermediate positions until he became a captain. He described the system of education and training which, to his knowledge, were required by the Cunard Company. He testified that the Cunard Company never appoints an officer who is not of its own training. "They all come in at the bottom grade and work up"; that twice annually every officer is officially reported upon by the captain with whom he sails, and that these reports have a strong bearing on the officer's promotion; that promotions are not made on time basis, but on a merit basis. He described what the responsibilities of a captain of a modern passenger steamer are in addition to his duties in navigating the ship; that is, that he is responsible to the Government and the Company for all things happening on the ship; for the supervision of the cleanliness, morals and safety of the passengers; for everything that concerns the health of passengers and crew; for the maintenance of order; that he is a representative of organized government on the ship; that he has plenary powers and that he himself has had to

exercise those powers; that he is the sole judge in reference to all matters of complaint or grievance arising on the voyage; that he is responsible for the training of his own subordinate officers and for reporting on their qualifications.

Capt. Barr went on to testify (13 R., 1653-1659) that from his forty years' experience at sea, he did not think that desirable officers could be obtained for passenger steamships unless they were kept under observation for a considerable period of years before being entrusted with ultimate authority. He testified as to the peculiarly trying conditions to which the captain of a passenger steamer was subject on the North Atlantic; and that the requirements of that passenger service called for special training of officers for the service; that if a ship which had been engaged in traffic of a different sort were transferred with its former officers into the North Atlantic passenger business, he did not think that the requirements of that business could be met, and that he did not think it possible to meet the requirements of this class of business without a relatively long training of officers. He further testified that in the Cunard Company the subordinate officers in the navigating department of the ship and the officers in the engine force, and of the steward's department, did not get those positions until they had been with the company for a considerable period of time.

This testimony from a man trained for responsibility and occupying one of the most responsible positions on the sea shows the somewhat obvious fact that there cannot be safety at sea without the discipline and training and opportunities for selection which come from a long continued service. It follows from this that conditions which make for stability and continuity in business have

a direct bearing on safety, and that there is not the same element of safety when officers and vessels from another traffic come temporarily into the North Atlantic passenger service.

6.—COMPLIANCE WITH THE UNITED STATES IMMIGRATION LAWS.

The attention of the court has already been called to the class of immigrants who are invited to come to this country during rate wars and to the provisions of the United States immigration laws which throw upon steamship companies the responsibility for making the preliminary examination of immigrants.

As showing what the Cunard Company had done to carry out these laws, Mr. Lister testified (13 R., 1512-1514) that the Cunard Company has been at great expense to comply with the immigration statute. "We have had to see that all our agents live up to a higher standard; we have got to see that the whole of our business is conducted in the same fashion"; that the Cunard Company had got rid as fast as possible of all undesirable agents, and that along with the other companies it has for two or three years adopted a system to insure obtaining good agents, all of which was expensive; "we keep travelers who are continually going around to educate the agents up to what is required of them, to explain any point that they must be particular about, before accepting money from a passenger or attempting to book a passenger. We are continually watching the agents both by circulars and by personally visiting them to see that we have the best people and to see that they are doing just what they really ought to do."  
\* \* \* We absolutely have turned down all Conti-

mental agents in Liverpool. For instance, we won't let any foreign agent in Liverpool book any passenger such as an Armenian or Turk, or any of those that we know there is any suspicion about"; that since 1898, the company has taken into its employ a medical superintendent, who is a member of the company's staff, and gives his whole time to the company's work at a heavy cost to the company; that this medical superintendent not only examines the passengers before embarkation, but if an immigrant has been debarred by the United States authorities, this superintendent "sees exactly what the United States officials have rejected that man for and it is a guide and aid to him in future; if he came across a passenger who had been rejected for a certain thing, he would stop such passengers in future from going to America at all. We are very proud at the present time of our medical arrangements." \* \* \* "They have been built up from many years' experience."

Mr. Lister testified (13 R., 1517) that from his experience there would be very grave difficulties in conducting the business of a passenger line in conformity with the United States immigration law unless passenger rates are practically stable. Obviously, a line which comes into this great immigrant route as the result of a temporary condition caused by rate wars, and comes knowing that it may possibly soon be driven out—obviously, such a line cannot maintain a proper system of co-operation in the enforcement of the immigration laws.

If this Court is of the opinion that Agreement AA is not an unreasonable restraint of commerce, then nothing more needs to be considered. If,

however, the Court should consider that Agreement AA is an unreasonable restraint of commerce, then it will remain for the Court to consider whether or not Congress intended the Anti-Trust Act to apply to such agreements.

## POINT II.

**Congress did not intend by the Anti-Trust Act to prohibit and punish the making in other countries of such agreements as Agreement AA.**

It is not intended to question the power of Congress over foreign commerce, but the proposition sought to be established here is that Congress did not intend to exercise that power in the Anti-Trust Act so as to prohibit the making abroad of Agreements like AA.

1.—Statutes by which Congress exercises its jurisdiction over foreign commerce may involve the interests and rights of other nations. This Court has, therefore, announced certain principles to be followed in construing such statutes affecting commerce which is really international in character. If the Anti-Trust Act is construed according to those principles, it does not apply here.

2.—When Congress exercises its jurisdiction over international commerce, it has to overcome certain obstacles if it is to make its will effective outside of our territorial borders. These obstacles can sometimes be overcome, but this can only be done by the exercise of powers which are possessed by Congress and are frequently used, but which Congress did not use in the Anti-Trust Act.

## A.

Words of general import in an Act have not been construed as applying to persons outside the territorial jurisdiction of Congress unless the Act as a whole demanded such construction.

Agreement AA was made in London between corporations, all but one of which were organized and doing business under the laws of foreign countries. As shown by the record in this case and by the report of the Congressional Committee referred to under Point I the agreement was made in accordance with a world wide practice, which had existed for many years, and was in aid of commerce. Under the law of England it was a legal and proper contract (13 R., 1835-1856).

The question whether or not the agreement and the financial adjustments made under it were legal, must be determined according to the law of the country where the agreement was made. This rule has been applied by this Court for a century or more.

Chief Justice Marshall said in the case of *Bond v. Jay*, 7 Cranch U. S., 350:

“It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction between persons residing without their jurisdiction, that Courts can never be justified in putting such a construction on their words if they admit of any other interpretation which is rational and not too much strained.”

And again in 1818 in *U. S. v. Palmer*, 3 Wheat, 610, Chief Justice Marshall in considering an “act for the punishment of certain crimes against the United States,” the language of which was



“that if any person or persons shall commit upon the high seas,” &c., said:

“The words of the section are in terms of unlimited extent. The words ‘any person or persons’ are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state but also to those objects to which the legislature intended to apply them.”

In *The Appollon*, 9 Wheat, U. S., 362, 370, it is said:

“The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation within its own jurisdiction. And however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction to places and persons upon whom the legislature have authority and jurisdiction.”

Mr. Justice Story said in *Farnum v. Blackstone Canal Corporation*, 1 Sumner 46, 62:

“Now the general rule certainly is that every legislative act ought to receive a reasonable construction; and it cannot be presumed, that a legislature authorizes any act to be done in a foreign territory, when that act is beyond the reach of its proper jurisdiction or sovereignty. Every legislature, however broad may be its enactments is supposed to confine them to cases or persons within the reach of its sovereignty.”

This Court has uniformly applied this rule in matters relating to commerce, as in *Liverpool Steam Co. v. Phenix Ins. Co.*, 129 U. S., 397.

In the case of *Canada Southern R. Co. v. Gebhard*, 109 U. S., 527, this Court held that a settlement by a Canadian railroad company with its bondholders consented to by a majority of them was binding on the minority holders under Canadian law and therefore American holders of such bonds were also bound. The Court said (p. 536):

"That the laws of a country have no extra-territorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. \* \* \*

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (*Bank of Augusta v. Earle*, 13 Pet., 588), though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad v. Koontz*, 104 U. S., 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf v. Rundel*, 103 U. S., 226), and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. *A corporation of one country may be excluded from business in another country* (*Paul v. Virginia*, 8 Wall., 168), *but if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation.*" (Italics ours.)

The same principle was stated by this Court recently in a case which involved the question

whether a State statute had an extra territorial effect and where this Court held:

“The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious; and when a State attempts in this manner to affect conduct outside its jurisdiction or the consequences of such conduct, and to infringe upon the power of the United States, it must fail.” *Western Union Tel. Co. v. Brown*, 234 U. S., 542, 547.

The rule on this subject is concisely stated in *American Banana Co. v. United Fruit Co.* (213 U. S., 347, 356), where the question under consideration was whether the Anti-Trust Act applied to acts performed in Costa Rica:

“The general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National R. R. Co.*, 194 U. S., 120, 126. This principle was carried to an extreme in *Milliken v. Pratt*, 125 Massachusetts, 374. For another jurisdiction, if it should happen to lay hold of the actor to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillips v. Eyre*, L. R., 4 Q. B., 225, 239; L. R., 6 Q. B., 1, 28; Dicey, *Conflict of Laws* (2d. ed.), 647. See also Appendix, 724, 726, Note 2, *ibid.*”

This principle that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done does not, of course, extend so far as to compel us to submit to the effects of an act done abroad, or contract made abroad, where the statutes here declare in clear and unmistakable terms that such acts or contracts are illegal. But the question now being considered is whether the statute does show an intention on the part of Congress to declare agreements made abroad like agreement AA to be illegal. On that question of construction the presumptions are in favor of the usual rule that acts of Congress are to be understood to apply to persons residing and acts committed within its territorial jurisdiction. And the mere use of the words "foreign commerce" in the first and second sections of the Anti-Trust Act does not justify the conclusion that Congress intended to do so unusual a thing as to prohibit and punish acts committed abroad by persons not within its jurisdiction.

## B.

Acts of Congress ought, if possible, to be so construed as not to violate the rights of other nations having concurrent jurisdiction with the United States.

If the Anti-Trust Act here applies to a contract made by the Cunard Company in Great Britain, then the United States has sought to deny to a British corporation the freedom of contract accorded to that corporation by the laws of Great Britain. This is an undue interference with international relations. *American Banana Co. v. United Fruit Co.* (*supra*); *The Antelope*, 10 Wheat., 66.

If the United States may regulate commerce on the high seas with foreign nations—commerce which is really international—then other nations must have the same power, and, if such powers were exercised by all the nations participating in such commerce, hopeless confusion and conflict would ensue. It is to prevent this confusion and conflict that international law holds that a ship is, for certain purposes, a part of the territory of the nation to which she belongs, and in respect to matters which cannot be covered by this principle, international commerce is regulated by international agreement.

There is nothing in the Anti-Trust Act to indicate that Congress intended to disregard these principles of international law, and an intention to disregard them ought not to be implied.

On this subject, Chief Justice Marshall said:

“It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce further than is warranted by the law of nations as understood in this country.

“These principles are believed to be correct, and they ought to be kept in view in construing the act now under consideration.”  
*Murray v. The Charming Betsy* (2 Cranch., 64, 117-118).

The rule to be applied when two sovereignties have concurrent jurisdiction is discussed in the case of *In re Mattson*, 69 Fed. Rep., 535. Mattson was imprisoned for Sunday fishing in the Columbia River within the territorial limits of the State of Washington in violation of the laws of Oregon. Washington and Oregon had concurrent jurisdic-

tion over the river and the Court held that the State of Oregon had no authority to declare the act done within the territorial limits of the State of Washington criminal.

In the year 1909 this Court had occasion to consider the same question in connection with a law of Oregon against operating or maintaining a purse net in the Columbia River. *Nielson v. Oregon*, 212 U. S., 315, 321. In discussing the case, Mr. Justice Brewer said:

"The plaintiff in error was within the limits of the State of Washington doing an act which that State in terms authorized and gave him a license to do. Can the State of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that State had specially authorized him to do? We are of opinion that it cannot. It is not at all impossible that in some instances the interests of the two States may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two States is different, and the one State cannot enforce its opinion against that of the other, at least as to an act done within the limits of that other State. \* \* \* It is enough to decide, as we do, that for an act done within the territorial limits of the State of Washington under authority and license from that State one cannot be prosecuted and punished by the State of Oregon.

There is little authority upon this precise question, but see *In re Mattson*, U. S. Circuit Court for the District of Oregon, 69 Fed. Rep., 535, and *Ex parte Desjeiro*, same court, 152 Fed. Rep., 1004. See also *Roberts v. Fulerton*, 117 Wisconsin, 222; *Rorer on Interstate Law*, p. 438, and following."

If the facts here indicated an attempt to circumvent the laws of the United States, a different question might be presented; as, for example, if the parties to a proposed agreement had reached an understanding on the subject within the United States and had then adjourned to meet beyond the Canadian border for the purpose of making the agreement there and had done this to circumvent our laws. But here there was no effort at concealment. The agreement made was a usual one, of a sort which has been frequently made the world over in reference to transportation of this character. It was legal where made and no attempt to circumvent our laws is involved.

### C.

Having regard to the general plan of the Anti-Trust Act and to the rules of construction above discussed, the language of that Act taken as a whole does not indicate that Congress intended to prohibit and punish the making abroad of such an agreement as Agreement AA.

Section 1 operates on contracts and on persons. It declares illegal every contract in restraint of trade. It punishes every individual who shall make such a contract. Applying the rules of construction which have just been discussed, it is proper to conclude that in thus dealing with contracts and persons Congress intended to deal only with such as came within its territorial jurisdiction.

Section 2 of the Act deals with and punishes *persons* who monopolize, or attempt to monopolize, trade or commerce. Here it is certain that the Act has reference only to persons within the territorial jurisdiction of Congress, for



Congress cannot have intended to punish a person not in its territorial jurisdiction. Yet Sections 1 and 2 of the Act both refer in the same words to foreign commerce. What one refers to the other refers to. It is certain that Section 2 cannot refer to an act committed abroad and we cannot conclude that Congress used the same words in different senses in these two adjoining sections and intended to reach by the first section acts which it certainly did not intend to reach by the second.

Section 3 again deals with contracts and persons; that is, it declares illegal contracts in restraint of trade in any Territory, etc., and it punishes every person who shall make such contract. The same comment applies here as in the case of Section 1 of the Act.

Sections 4 and 5 relate to courts and procedure.

Section 6 then takes up another subject, that is, the forfeiture of property owned under a contract mentioned in Section 1 of the Act. Now, if the Government were right in claiming that Section 1 of the Act applies to Agreement AA, then we ought to find in Section 6 that the penalty of forfeiture applied to property in the course of transportation, whether it was going to a foreign country or coming from a foreign country. But that is not what Congress provided in Section 6. Congress provided that the penalty of forfeiture should apply only to such property in the course of transportation "*to a foreign country.*" Congress thus deliberately and expressly distinguished between commerce originating in the United States and commerce originating abroad.

It is not necessary to argue the proposition that the remedies provided by such an Act as this are exclusive and cannot be extended by implication.

## D.

When Congress, in the exercise of its jurisdiction over foreign commerce, desires to make its will effective outside of our territorial borders, certain unavoidable obstacles must be overcome. These obstacles can sometimes be overcome, but this can only be done by the exercise of powers which are possessed by Congress and are frequently used but which Congress did not use in the Anti-Trust Act.

If Congress desires to prohibit the performance of certain acts abroad which may affect our foreign commerce, then, while it may not have jurisdiction over the person abroad who may commit the act, it has jurisdiction over the commerce affected by the act. The effective and usual method of carrying out the will of Congress in such a case is to exclude or to hinder the particular commerce in connection with which the act is performed. If the circumstances call for so drastic a remedy, any independent sovereignty may prohibit all aliens from crossing its borders and may prohibit the importation of all merchandise. And where it is desired to exclude a certain class of aliens or certain kinds of merchandise, an independent sovereignty may exclude these by proper statutes.

The unquestioned power of Congress to detain foreign commerce, or to exclude it, does not purport to be exercised by the Anti-Trust Act, and, as this was the only power by which Congress could make its will effective if it intended to prohibit the making of contracts in foreign countries, it is reasonable to conclude that the failure of Congress to use this familiar power indicated that it did not intend the Act to apply to such contracts made abroad.

In giving as it did in the Anti-Trust Act powers to the Federal courts, Congress must have intended that the judgments to be rendered should be effective. A study of the prayer of this petition will show the practical difficulties which are involved in attempting to apply the Anti-Trust Act in this case. Had Congress intended the Act to apply to such Contracts as Agreement AA it could not well have overlooked such difficulties, especially as the difficulties could have been readily removed had it used its undoubted power to hinder or exclude the commerce affected.

The first clause of the prayer of the petition is, that Agreement AA be declared to be in violation of the Anti-Trust Act; that the defendants and their employees be enjoined from carrying it out, and that the contract be cancelled.—It is obvious that our government cannot prevent British ships from carrying passengers on the high seas, and it is equally obvious that it cannot enjoin a British corporation from paying over in England to a Dutch, German or Belgian corporation a part of the money which the British corporation has collected from its passengers.

The most that our Government can do with respect to a British corporation or its steamers, is to prevent them from entering our ports and from landing passengers or discharging merchandise here. The Act does not purport to do this.

The third clause of the prayer of the petition is, that the defendants and their employees be prohibited from further combining to maintain an established steerage rate or from doing anything in aid of a combination which will deprive the traveling public of such facilities and rates as will be afforded by free competition between the

defendants. It is again obvious that our Government has no power to prevent these acts abroad or on the high seas, and all that our Government can do is to exclude the foreign ships.

The fourth clause of the prayer of the petition is that defendants and their employees be enjoined from combining to injure or destroy business of other lines engaged, or to be engaged, in carrying steerage passengers, or from acting together to monopolize such business. And the fifth clause of the prayer is that the defendants and their employees be prohibited from making or performing any contract, the object of which will be to restrain or monopolize the carriage of steerage passengers.—Here again our government is unable, in the nature of things, to control acts performed by foreign subjects or corporations in foreign countries or on the high seas, and must content itself with excluding from our ports foreign ships, the financial affairs of whose owners are claimed not to accord with our domestic statutes.

In this examination of the various clauses of the prayer, Clause II has been omitted because that merits separate consideration, for it is the only one in which the petition asks for relief which it is in the power of the United States Government (but not, it is submitted, of this Court) to give.

By the second clause it is asked that the defendant lines *be enjoined from entering or clearing their ships at any port of entry within the United States* so long as they continue to operate under Agreement AA or any similar combination.

*Congress has power, by appropriate action, to close our ports, in whole or in part, but it has not exercised that power in the Anti-Trust Act, and still less has it, by that Act, delegated the power to the Federal courts.*

The closing of our ports to the ships of a foreign nation is an act within the sphere of international relations and not within the sphere of the administration of justice. It is an act which closely affects our peaceful relations with foreign countries. It cannot be supposed that Congress would delegate to the Federal courts, or to any officer of the Department of Justice, the power to perform such an act and to commit the nation to such a policy, still less can it be supposed that such a power could be given by Congress *by implication in a statute which contains no express language on the subject.*

The case of *Patterson v. Bark Eudora*, 190 U. S., 169, cited by the Government (Government's Brief, p. 59) emphasizes the point for which these defendants here contend. The Government now claims that there is an implied condition in the Anti-Trust Act that foreign vessels are to be excluded from United States ports in case the owners of the vessels are guilty of a breach of the Act, and cites the *Patterson* case in support of that proposition. As a matter of fact, however, Congress has been very careful to use explicit terms whenever it has attempted to exclude a foreign ship or punish a foreign ship-owner. In the *Patterson* case the statute under consideration related to the prepayment of seamen and so far from leaving the enforcement of the statute to implication Congress expressly provided as follows, p. 171:

“(f) That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a

similar violation: Provided, that treaties in force between the United States and foreign nations do not conflict."

If we refuse entry to the ships of these foreign lines, because the lines have made in their own country an agreement which the law of their country permits, we must anticipate that foreign countries will have sufficient self-respect to exclude our ships from their ports. But this would be imposing one of the evils of war on nations who are seeking to live at peace. The Anti-Trust Act has been exposed to criticism, but no one has suspected that it was as dangerous as this portion of the prayer of the petition would seem to suggest.

It is idle to argue that these foreign companies might avoid exclusion from our ports by conducting their *financial affairs in their own countries* in accordance with our domestic statutes. Suppose Great Britain should decide to admit to her ports only such of our ships as were owned by companies which conducted their financial affairs in conformity with the acts of the British Parliament. Such an act of exclusion would hardly be submitted to, for it would be in derogation of the sovereignty of this nation.

No self-respecting nation could permit its citizens to submit to such dictation by a foreign power, and the controversy would at once become an international issue. This might well cause retaliation, so that the nation which had first moved in the matter might have to submit to all the evils of international exclusion.

If Congress had intended to prohibit and punish the making abroad of an agreement like AA, it could readily have made that intention effective by expressly exercising its power to

exclude. This will be seen by observing cases where Congress has used its power to hinder or exclude foreign commerce in order to control acts performed in foreign countries. In all such cases it has exercised its powers expressly.

For example: In this country there is a certain policy against using the products of convict labor. That policy cannot directly affect the employment of convict labor in other countries, but in so far as convict labor produces in foreign countries articles which are imported into this country, our policy in this regard has been made, at least in part, effective by the provisions of the Wilson Tariff Act, 28 St., 509, where (continuing a similar provision in the McKinley Tariff Act of 1890) it excluded all goods manufactured in whole or in part in any foreign country by convict labor (Sec. 24).

Again, our domestic laws as to the adulteration of foods cannot control individuals in foreign countries, but by Act of August 30, 1890 (U. S. Compiled St., 1913, Sec. 8731) power is given to the President to suspend by proclamation the importation from foreign countries of all food products so far adulterated as to be dangerous to health.

Again, Section 9 of the Immigration Act declares it unlawful for transportation companies to bring to our shores aliens who are suffering from certain diseases. It is clear from the section that Congress intended to require that a competent medical examination of aliens be made by the ship owner at the port of embarkation abroad before receiving the alien as a passenger, and intended to punish the ship owner if that medical examination was not a proper one. Congress proceeds therefore to make its will effective by utilizing its power to check or prohibit commerce, and



so it provides that if, when the alien arrives and is examined here, it appears that he is suffering from a complaint which might have been detected had a competent examination been made on embarkation, then a fine shall be imposed on the ship owner and *the ship shall be refused clearance until the fine is paid.*

It is inherently improbable that Congress intended the Anti-Trust Act to apply to agreements like AA made abroad and legal where made. It is true that agreement AA has a certain connection with our foreign commerce but so have agreements affecting the importation of merchandise from foreign countries to the United States. For example if a syndicate or combination exists in Germany which controls the preparation and export of potash and which would violate the Anti-Trust Act if made here, does the Anti-Trust Act extend to such a combination abroad and can our Federal courts enjoin the sale in this country of the potash exported from Germany under such a combination?

It is probable that many articles imported into the United States were produced by combinations or monopolies which would be illegal here. Those monopolies affect our foreign commerce and if by reason of that connection with foreign commerce the Anti-Trust Act applies to them, then Congress when it passed that act legislated for a considerable part of the world.

Again the penal provisions of the Anti-Trust Act show how improbable it is that Congress could have intended it to apply to a case like this.—The chief officials of the Cunard Company, for example, come to the United States at relatively

short intervals. If the Government is right in claiming that Section I of the Anti-Trust Act applies to Agreement AA, then it would become the duty of the proper Federal Attorney to indict such a steamship official under Section I of the Act on his arrival here and to seek to have the official fined or imprisoned for taking part in the making of a contract which was both legal and usual in his own country where the contract was made. It would be essentially wrong to punish a man in such a case and we cannot attribute to Congress the intention to impose such a duty on the Department of Justice. The view of this Court on the subject is shown by the words of Mr. Justice Holmes, already quoted, where he said in the *American Banana Company case*, "for another jurisdiction, if it should happen to lay hold on the actor to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another Sovereign, contrary to the comity of nations, which the other state concerned justly might resent."

The brief for the Government seeks to show that the Anti-Trust Act extends to ocean transportation, and therefore that the Act extends to this case. (Government's brief, pp. 45-56.) But this does not follow. The question is not whether the Act applies to ocean transportation, but whether it was intended to apply to the international ocean transportation here involved. If a number of American steamship companies operating lines to foreign countries should make a contract here in the United States which was an unreasonable restraint of commerce, then the illegal act would have been committed within our borders

and our Federal courts would have jurisdiction over the offending American corporations and over their business, and those courts could, therefore, declare the agreement invalid and enjoin the American corporations from doing business under it. To that extent the Anti-Trust Act may be said to extend to ocean transportation. But where, as in this case, the agreement is made in good faith abroad and is valid there, then, although the contract may affect our foreign commerce, it is, nevertheless, the precedent in this court that before an American statute can be construed to extend to such a foreign contract the statute must conform to the rules laid down by this Court for the interpretation of statutes which may operate beyond our territorial borders and affect the rights of other nations. It is sought to be shown in this brief that the Anti-Trust Act, when tested by those principles of construction, does not apply here. Therefore, from the fact that the Anti-Trust Act may, in certain imaginable cases, apply to ocean transportation it does not follow that it applies here.

On this particular subject, the Government cites:

*U. S. v. Pacific & Arctic Co.*, 228 U. S., 87;  
*U. S. v. Union Pac. R. Co.*, 226 U. S., 61,  
and  
*Cinn. Packet Co. v. Bay*, 200 U. S., 179.

An examination of these three cases will show that none of them is authority for extending the Anti-Trust Act to this case.

A number of cases are cited for the government to sustain the proposition that Congress has jur-

isdiction and actual power over foreign commerce.

These defendants do not dispute that proposition. In fact, some cases cited by the government (as *Oceanic Steam Navigation Co. vs. Stranahan*, 214 U. S., 320, which grew out of Section 9 of the Immigration Act above referred to) show how Congress makes its intention plain in cases where it does intend to control or prohibit acts performed abroad but affecting our commerce.

In the case of *U. S. v. Nord Deutscher Lloyd*, 223 U. S., 215, referred to by the government, there was a palpable attempt to evade a plain provision of the Immigration Law for it was unmistakably the intention of Congress to prohibit and punish the very thing which the owner of the ship did in that case. In the case at bar, the question is not as to the powers of Congress, but as to the intent of Congress.

In support of the proposition that there is in the Anti-Trust Act an implied authority to exclude foreign vessels in cases of violation of the Act, the Government cites (Govt.'s Brief, pp. 59, 60 and 61) the following cases:

*Noble State Bank v. Haskell*, 219 U. S., 104;

*The Tobacco Case*, 221 U. S., 106, and  
*Buttfield v. Stranahan*, 192 U. S., 470.

Referring to the first of these cases the Government says:

"The statute which in *Noble State Bank v. Haskell* (*supra*) this Court interpreted as going from regulation to prohibition, except upon such conditions as it may prescribe (291 U. S., 113), was not in terms conditional."

The language thus quoted by the Government was not used by this Court in reference to the terms of a statute, but in reference to the powers of a State to regulate banking.

The reference made to the *Tobacco* case is to that part of the Court's opinion where the Court says that as an appropriate means of enforcing the law the Court might issue "a permanent injunction restraining the combination as a universality \* \* \* from continuing to engage in interstate commerce until the illegal situation be cured."

This has reference to interstate commerce and as such commerce is entirely within the jurisdiction of Congress, without any complications growing out of territorial limitations or the rights of other nations, the injunction order of the court in respect to interstate commerce is entirely effective. This principle does not affect the proposition for which these defendants are here contending, which is, that where Congress has intended to exclude foreign vessels and to punish foreigners for acts committed abroad, it has not failed to make that intention clear in the terms of the statute.

The case of *Buttfield v. Stranahan* is cited by the Government apparently to sustain the proposition that Congress has power to exclude. This is not disputed. In fact, the decision in *Buttfield v. Stranahan* goes to sustain the contention of these defendants for it related to the exclusion of impure teas and the statute under consideration expressly prohibited their importation.

### POINT III.

**Various matters referred to in the testimony were not covered by the provisions of Agreement AA, and do not affect the validity of that agreement.**

#### 1.

##### FIGHTING SHIPS.

The fighting ships were not run under any provisions of Agreement AA, but in pursuance of a Minute of the Conference adopted several months later. The Congressional Committee referred to in Point 1 recommended that only two of the practices known to the shipping combinations be declared illegal; one was the use of deferred rebates, which does not appear in this case and would be impossible in passenger business, and the other was the use of "fighting ships." The running of "fighting ships" was not provided for in AA and some of the lines, including the Cunard Line, objected to having their steamers designated as "fighting ships" (12 R., 1162, 1163). That company has not contended in this proceeding for any right to run or to participate in the running of fighting ships.

#### 2.

##### COMMERCIAL ALLOWANCES.

The petition in this suit contains no reference to the "commercial allowances" (commissions) which are given by the American railroads to the Transatlantic Lines, nor does Agreement AA contain any provision relating thereto.

The steamship companies maintain agencies in Europe and sell to the prospective emigrant a

ticket for his ocean transportation and also an order for his rail transportation from New York to inland destination. This is really an agency service rendered by the steamship lines to the railroads and the so-called "commercial allowance" is in payment for that service. It is obviously a convenience to the passenger to buy through tickets and it is equally clear that the steamship lines could not afford to do it unless paid for it by the railroads. It is to be kept in mind that the steamship lines incur all the expense and run all the risks connected with these agencies in Europe and the railroads are totally relieved of this expense and risk (12 R., 872-877).

The testimony taken in this proceeding respecting commercial allowances was carefully digested and considered by the Congressional Committee referred to in Point I. The report of the Committee (pp. 48-51) discusses the effect of this arrangement at considerable length and shows it to be in the interest of the public.

These arrangements as to commercial allowances relate, in a general way, to the carriage of steerage passengers, but they are not a part of the combination to prevent rate wars effected by the lines under Agreement AA. The Congressional Committee concurs with the Interstate Commerce Commission in finding that the arrangements between the steamship companies and the American railroads are in the interest of the public, and the only criticism made by the Committee is against the provision that allowances shall be paid exclusively to the contracting steamship lines. If this Court now considers that this subject comes within the issues and that this provision in respect to paying allowances only to the contracting steamship companies is illegal, there



is no reason why the objections to that minor feature of the arrangement should render illegal the general features of the agreement which have been held both by the Interstate Commerce Commission and the Congressional Committee to be in the public interest. It is understood to be the policy of this Court not to declare illegal an entire contract or arrangement where the law would be satisfied by eliminating certain offending provisions.

*U. S. v. St. Louis Terminal*, 224 U. S., 383, 411.

### 3.

#### CONTROL OF AGENTS.

The rule complained of by the Government in this connection reads as follows:

“9.—Agents are prohibited from booking passengers for any steamer except those of the Lines, Members of the Continental, the Mediterranean and the North-Atlantic Passenger Conferences, unless Conference gives express permission in writing. Agents are prohibited from selling passage tickets under false representations as to the Line or the route by which the passenger is to be transported.”

Monopolizing the attention of a ticket agent does not involve monopolizing trade or commerce, or any part of trade or commerce. If two principals allow the same agent to represent them on the stipulation that he shall not represent competitors, they adopt one of the commonest precautions of the business world, but they do not thereby prevent the public from dealing with other agents or other principals. If it is an illegal restraint of trade or commerce for two principals

to appoint the same agent on the stipulation that he shall not represent their competitors, then it must result from such a rule that agents must either represent only one concern, or, if they represent more than one, must be free to represent all, however antagonistic their interests may be. Business could not well endure such a rule and an intention to lay down such a rule cannot well be imputed to Congress.

And the application of such a rule would be particularly disastrous both to carriers and to the public if applied to ticket agents. Much of the money taken in by transportation companies passes through the hands of ticket agents. They must, therefore, be selected for integrity and efficiency and must become familiar with the facilities offered by the transportation companies whose tickets they sell. But, except in the largest cities, the sale of the tickets of any one transportation company would not warrant the maintenance of a separate agency by that company, and it is well known that, by general custom, there exist throughout this country ticket agencies where the tickets of a number of different transportation companies may be bought.

The claim of this portion of the petition would seem to be that in such a case there has been an illegal restraint of trade, unless the various companies who employ the agent also permit him to use the facilities and standing and business experience which they have helped him to acquire to serve every competing line, however irresponsible or untrustworthy such a line may be.

There is a broad distinction between this case and the case of principals who are dealing with *purchasers*. If two or more companies sell to a purchaser on the stipulation that he will not buy

of any other concern, then they may restrain the freedom of that purchaser to deal with others, and the freedom of others to sell to that purchaser, and, to that extent they may restrain trade. But here, the agent is not a purchaser, but is the representative and employee of the line and the line pays his compensation, either by salary or by commission on sales. The agreement by which the agent is prevented from selling the tickets of other lines does not prevent any one of the public from buying the tickets of those other lines, and it does not prevent those other lines from selling tickets to any one of the public. The only thing monopolized is a portion of the time of the ticket agent.

The cases cited by the Government at page 98 of its brief are not authorities sustaining the contention of the Government on this point.

In *Loewe v. Lawlor*, 208 U. S., 274, the Court was dealing with a labor combination which aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes.

In *Eastern States Retail Lumber Dealers' Ass'n. v. U. S.*, 234 U. S., 600, the combination complained of was one of retail dealers who refused to deal with certain wholesale dealers, and the Court held that its effect was to hinder and impede the trade of the listed wholesalers.

The commerce herein involved is the transportation of passengers and freight. How is that commerce restrained by the selection of agents? Are not all persons wishing transportation free to go to other agents or to the steamship companies themselves to obtain accommodation? As this Court has repeatedly said the effect of the combination must be direct and proximate.

In *Hopkins v. U. S.*, 171 U. S., 578, the Government complained that the Anti-Trust Act had been violated because certain rules adopted by the members of the Kansas City Live Stock Exchange provided that commissions charged by members for selling should not be less than certain named amounts and prohibited the employment of any agent, solicitor or employee, except upon a stipulated salary, not contingent upon commissions earned, and provided that not more than three solicitors shall be employed at one time by a firm or corporation, and that no member of the exchange should transact business with any persons violating the rules of the exchange, or with expelled or suspended members. The Court said (p. 592):

“The contract condemned by the statute is one whose direct and immediate effect is a restraint upon that kind of trade or commerce which is interstate. Charges for such facilities as we have already mentioned are not a restraint upon that trade, although the total cost of marketing a subject thereof may be thereby increased. Charges for facilities furnished have been held not a regulation of commerce even when made for services rendered or as compensation for benefits conferred. *Sands v. Manistee River Improvement Co.*, 123 U. S., 288; *Monongahela Navigation Co. v. U. S.*, 148 U. S., 312, 329, 330; *Kentucky & Indiana Bridge Co. v. Louisville &c. R. R.*, 37 Fed. Rep., 567.

“To treat as condemned by the Act all agreements under which, as a result the cost of conducting an inter-state commercial business may be increased would enlarge the application of the act far beyond the fair meaning of the language used. There must be

some direct and immediate effect upon inter-state commerce in order to come within the act. \* \* \* Many agreements suggest themselves which relate only to facilities furnished commerce or else touch it only in an indirect way, while possibly enhancing the cost of transacting the business and which at the same time we would not think of as agreements in restraint of inter-state trade or commerce. They are agreements which in their effect operate in furtherance and in aid of commerce by providing for its facilities, conveniences, privileges or services, but which do not directly relate to charges for its transportation nor to any other form of inter-state commerce. To hold all such agreements void would, in our judgment, improperly extend the act to matters which are not of an inter-state commercial nature."

In *U. S. v. Joint Traffic Ass'n.*, 171 U. S., 505, 567, this Court pointed out that certain forms of contract had never been regarded as in the nature of contracts in restraint of trade or commerce, and said:

"It might also be difficult to show that the appointment by two or more producers of the same person to sell their goods on commission was a matter in any degree in restraint of trade."

### **LAST POINT.**

**This proceeding ought to be dismissed on the ground that Congress did not intend the Anti-Trust Act to apply to agreements like Agreement AA made in**

good faith abroad. But if this Court is of opinion that Congress did intend the act to apply to such agreements, then the decree below should be affirmed.

LORD, DAY & LORD,  
*Solicitors for the Cunard Steamship  
Co., Limited, and Charles P.  
Sumner.*

LUCIUS H. BEERS,  
ALLAN B. A. BRADLEY,  
*Of Counsel.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1915.

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No. 289.

THE UNITED STATES OF AMERICA, APPELLANT,

*v.*

HAMBURG - AMERIKANISCHE PACKETFAHRT - ACTIEN  
GESELLSCHAFT ET AL.

No. 332.

HAMBURG - AMERIKANISCHE PACKETFAHRT - ACTIEN  
GESELLSCHAFT ET AL., APPELLANTS,

*v.*

THE UNITED STATES OF AMERICA.

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REPLY MEMORANDUM FOR THE UNITED STATES.

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We desire to reply briefly upon five points.

I.

AS TO THE APPLICATION OF THE LAW TO OCEAN TRANSPORTATION, AND HEREIN AS TO THE ANTITRUST PROVISION OF THE WILSON TARIFF ACT.

Defendants concede the *power* of Congress to make the antitrust act applicable to themselves.

The question now is merely as to the *intent* of Congress. On this point it is not entirely clear



whether the defendants contend that the antitrust act is not applicable at all to ocean transportation between the United States and foreign countries, or whether they contend that the act is not applicable to combinations affecting such transportation *when made in a foreign country and composed of foreign corporations*. They seem to waver back and forth upon these two positions.

We take it, however, that the latter position is the one on which they principally rely. In fact, the brief for the Cunard Company expressly concedes that the act is applicable to a combination formed in this country by *American* steamship lines engaged in transportation between this and foreign countries. It says (p. 69-70):

If a number of American steamship companies operating lines to foreign countries should make a contract here in the United States which was an unreasonable restraint of commerce, then the illegal act would have been committed within our borders and our Federal courts would have jurisdiction over the offending American corporations and over their business, and those courts could, therefore, declare the agreement invalid and enjoin the American corporations from doing business under it. To that extent the antitrust act may be said to extend to ocean transportation.

But it contends that a combination formed in a foreign country by foreign steamship lines engaged in that same transportation would not be subject to the act. It would follow, therefore, if this view

were sound, that there would be one rule for *American* steamship lines engaged in transportation between this and foreign countries and another and (from the standpoint of the shipowner) more favorable rule for *foreign* steamship lines engaged in that same traffic.

We do not believe that Congress intended any such discrimination against American ships.

The defendants are not consistent in any construction, however, for in another place in the brief for the Cunard Company they say (p. 73) :

That company has not contended in this proceeding for any right to run or participate in the running of fighting ships.

Likewise, the brief for the Hamburg-American Line, the Allan Line, and the Canadian Pacific Railway Company states (p. 17) that none of those companies—

have appealed from the decree of the District Court enjoining the continuance of the [fighting ship] methods complained of.

Thus several of the principal defendants admit that the antitrust act applies even to combinations of foreign steamship lines under some circumstances, for unless it does apply the defendants have a perfect right to operate fighting ships as much as they please.

It is difficult to see just what the antitrust provision of the Wilson Tariff Act has to do with this case. The scope of the Sherman Act is defined in sweeping terms, covering "every" combination in

restraint of "trade or commerce among the several States or with foreign nations." As already shown in the Government main brief (pp. 45-46), these are the very words which are used in the Constitution to describe the power of Congress itself. Their meaning was definite and long settled by innumerable decisions of this court, as in the case of *Gibbons v. Ogden*, 9 Wheat., 1, 193. It must be presumed that in using these words, familiar to everyone, and particularly to the eminent lawyers who framed the Sherman Act, Congress intended to include all commerce over which the Federal power extends.

Indeed, Mr. Justice Peckham so stated in *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290, the first case wherein affirmative relief under the Sherman Act was accorded by this court, saying (pp. 324-325):

Congress has, *so far as its jurisdiction extends*, prohibited all contracts or combinations in the form of trusts. \* \* \*

*Transportation of commodities among the several States or with foreign nations* falls within the description of the words of the statute with regard to the subject. [Italics ours.]

Defendants seem to contend, however, that the provisions of the Wilson Act, specifically prohibiting combinations as to imported goods, reflexly indicate that Congress supposed such combinations were not already covered by the Sherman Act. But

cumulative and overlapping legislation is so frequent that the inference to be drawn from the mere enactment of a subsequent statute covering in part the same ground is far too weak to counteract the overwhelming presumption that Congress, when using familiar and unambiguous language, meant exactly what it said. As pointed out in *Bishop, Statutory Crimes*, 3d ed., section 160:

Our jurisprudence is full of instances in which two or a dozen distinct laws cover one question, or cluster of facts, and all stand together, parties having their election on which one to proceed.

Our public-land laws constitute a notorious example of such overlapping legislation. The Indian liquor laws constitute another. As shown in the cases of *Ex parte Webb*, 225 U. S., 663, and *United States v. Wright*, 229 U. S., 226, the offense of introducing liquor into that portion of Oklahoma formerly known as Indian Territory may be punished under three independent statutes, each prescribing a different penalty, namely, the act of July 23, 1892 (27 Stat., 260), the act of March 1, 1895 (28 Stat., 693), and the act of January 30, 1897 (29 Stat., 506). In the *Wright case*, Mr. Justice Pitney said (229 U. S., 233):

It seems to us, upon the whole, that during this transition period preceding the admission of Oklahoma as a State, the several acts referred to were intended to and did stand together, excepting so far (if at all) as they were necessarily repugnant to one another \* \* \*.

In *United States v. Claflin*, 97 U. S., 546, it was held that an express recital in a statute that a former law had been repealed by subsequent legislation was not conclusive as to such repeal, that being a judicial, not a legislative, question.

*Endlich on the Interpretation of Statutes*, sec. 372, collects a great number of instances where legislative bodies have acted without clearly apprehending the existing law.

Furthermore, the circumstances under which the antitrust provision of the Wilson Tariff Act was passed completely negative the suggestion that it indicates any belief whatever on the part of Congress as to the scope of the Sherman Act.

The Wilson Tariff Act was passed at 10.47 p. m. on the night of July 3, 1894 (26 Cong. R., 7136). On the very evening of its passage Senator Morgan, who was not a member of the committee in charge of the bill and who acted purely on his own initiative, proposed on the floor of the Senate the amendment concerning combinations with regard to imports.

The entire debate upon the proposed amendment occupies only three pages in the Congressional Record (26 Cong. R., 7117-7120), and consists almost entirely of discussion as to the propriety of offering amendments at that critical moment. The Senate, weary of the long debate over the tariff act and willing to do almost anything to avoid a controversy which might prevent or delay its passage,

acquiesced in the proposal practically without discussion on the merits. It is significant that none of the leading members of the Judiciary Committee who framed the Sherman Act in 1890 had anything to do with this rider on the Wilson Tariff Act.

Senator Morgan seems to have been actuated by the thought that Judge Jackson's opinion in *In re Greene*, 52 Fed., 104, had virtually nullified the Sherman Act, so far as interstate commerce was concerned. Apparently, however, he hoped by a specific provision based upon the plenary power of the Federal Government to exclude imports, to accomplish something, at least, with regard to foreign commerce.

The character of the debate is shown by the following excerpt from the argument of Senator Morgan himself (26 Cong. R., 7117) :

I believe that the difficulties which have been found in the judicial decisions of Judge Jackson and some judges of inferior grade in regard to the language of the act of 1890, predicated upon the interstate commerce features of the Constitution, have been obviated entirely by the provisions of this section (p. 7117).

\* \* \* \* \*

I wish to remark in regard to the amendment that it can not possibly do any harm if we will take it for granted that no man is ever to be convicted under it; that it is such a sieve as that it will hold nothing in the way of judicial determination. Yet there it stands for two purposes. One is to threaten and alarm these

men from entering into such combinations. The other is the expression of the view of the Congress of the United States that these trusts in all their multiplied hideousness, I will say, are against our common conviction and meet our stern reprobation (p. 7119).

Senator Gray said:

I confess that I appreciate the importance of it, and I appreciate the difficulties that exist in the way of attaching so important an amendment to this tariff bill at this time, in these hours which we hope are the closing hours of this debate. \* \* \* I feel that this unusual and abnormal method of introducing such important punitive legislation is not at this time, in the heat and hurry of these hours, to be considered wise on our part (p. 7119).

Senator Morgan replied:

The suggestion offered by the Senator from Delaware it does not seem to me has very great weight, because the proposed punishment of these combinations does not affect any person whatsoever—it can not affect any person whatsoever—who is honestly engaged in free and fair competition in trade under the new revenue law (p. 7119).

Senator Daniels said:

Before I take my seat I should like to have an understanding between the Senator from Alabama and the committee. He tells us that he consulted the committee before he offered the amendment, and was encouraged to do it.

Mr. MORGAN. No; I did not say that.



Mr. DANIELS. I beg pardon, sir; I am trying—

Mr. MORGAN. I said the committee had no objection to it, and I did not consider it any breach of the agreement that I should offer it (p. 7120).

Senator Dolph said:

I am afraid it will not accomplish very much if enacted into a law, but it is a move in the right direction. As has been said, it can not hurt any innocent man (p. 7120).

Thereupon the amendment was agreed to without even calling the roll.

Furthermore, if the words "commerce with foreign nations" as used in the Sherman Act do not mean "commerce with foreign nations," what do they mean? The only rational inference to be drawn from the Wilson Tariff Act, assuming that any inference whatever should be drawn from it, is that the Sherman Act did not cover *inbound* foreign commerce.

But that would not help the defendants, for they are engaged in *outbound* commerce as well as *inbound*.

Surely it can not be maintained that the Sherman Act was not intended to apply to commerce which in any way involves relations with other countries, for *all* foreign commerce is necessarily of that character. Such a construction would read the words "commerce with foreign nations" wholly out of the act.

The defendants themselves do not contend this, for, as shown above, the brief for the Cunard Line concedes that a combination doing precisely the same things, but composed of American lines and formed in this country, would be amenable to the act.

They are forced to rely upon the wholly untenable proposition that one rule exists for *American* steamship lines and another and (from the standpoint of the shipowner) more favorable rule for *foreign* steamship lines in the same traffic.

## II.

**AS TO THE SUGGESTION THAT POOLING AGREEMENTS BE PERMITTED SUBJECT TO CONTROL BY THE INTERSTATE COMMERCE COMMISSION OR TO REGULATION BY INTERNATIONAL AGREEMENT.**

Defendants in their briefs place great reliance upon the fact that proposals have been made in Congress (1) to permit ocean carriers to form pooling combinations, subject, however, to the most rigid control by the Interstate Commerce Commission, extending even to the fixing of their rates; or (2) to regulate the rates and practices of ocean carriers by international agreement.

It may be that the application to ocean carriers of the law against restraint of trade is not as good a way of controlling their rates and practices as regulation by the Interstate Commerce Commission would be. It may be, again, that a still better way

of controlling their rates and practices would be by international agreement.

Assuming all this, however, it does not follow that until regulation by the Interstate Commerce Commission shall be provided for by Congress, or until an international agreement shall be reached, ocean carriers should be left free to exact by combination whatever rates their cupidity may suggest, and free to attack any line inclined to pursue an independent course.

Assuming, we repeat, that it is possible to devise a better remedy, it does not follow that we should throw away the only remedy now in our hands.

On the contrary, the very fact that these proposals have been made shows that it is generally recognized that these combinations must be subject to some governmental check.

The argument of the defendants comes to this: While conceding that the situation calls for some form of governmental check, and while conceding that the check provided by the antitrust act in terms applies to the situation, nevertheless, it was not the intention of Congress that the check prescribed by the antitrust act shall apply because it is possible to devise a better check.

It needs no argument to demonstrate that the prospect of an international commerce commission, with power to fix freight rates, regulate practices, etc., is extremely remote. As stated in Mr. Alexander's speech, quoted in the brief for the

North German Lloyd Company (p. 12) all that has been done thus far is to authorize Mr. Lubin, the American representative at the International Institute of Agriculture at Rome, to propose to the permanent committee of that institute a resolution with regard to the creation of such an international commission. Mr. Alexander says:

If they regard it favorably, they will present the resolution to the general assembly in 1915. If the general assembly agrees that it is a subject that will promote the interests of the farmers and they regard the time opportune, they will then take steps to call an international conference in 1917 to consider the question of organizing this international commerce commission, to be vested with powers set out in the resolution. \* \* \* Whether it is possible to accomplish our purpose in that way or not, of course, we do not know. That will depend upon the attitude of the nations controlling the larger part of the ocean-borne commerce of the world.

The impracticability of securing such joint action among fifty-four different nations, especially in view of the present disturbed condition of international affairs, is conceded by the brief for the Hamburg-American Company et al., which says (p. 59):

No international commission is now existing or is likely to be in existence for many years to come.

The report of the House Committee on Merchant Marine and Fisheries, to which the defendants so frequently refer, is most emphatic in its statement that some form of governmental regulation is absolutely necessary, and the bill which accompanied the report of the committee and which embodies its recommendations, provides for *exempting* from the antitrust laws such agreements as the present *only when approved by the Interstate Commerce Commission* (H. R. 17328, 63d Congress, 2d session).

The defendants in their briefs quote only the chapter of the committee's report regarding the *advantages* of pooling agreements. There is also another chapter regarding their *disadvantages*, from which we quote the following (Doc. No. 805, 63d Cong., 2d sess., p. 304 et seq.):

*I. The monopolistic nature of such conferences and agreements.*—Nearly all the objections advanced against steamship agreements relate to the limited monopoly, at least, which the conference lines are able to exercise over the trade in their respective areas. Briefly outlined the objections advanced under this heading are the following:

1. All monopolies are liable to abuse, and in our foreign carrying trade the monopoly obtained by the conference lines has not been subjected to any legal control. While carriers by land are supervised and must conform to statutory requirements in the matter of rates and treatment of shippers, steamship companies, through private arrangements, have secured

for themselves monopolistic powers as effective in many instances as though they were statutory. Even granting the advantages claimed for steamship conferences and agreements, all may be withdrawn in the absence of supervisory control without the shippers having any redress or protection. The lines are under no legal obligation to continue these advantages. They exercise their powers as private combinations and are apt to abuse the same unless brought under effective governmental control.

2. The primary object of such conferences and agreements is to prevent new lines from being organized in a trade and to crush existing lines which refuse to comply with the conditions prescribed by the combination, or which for other reasons are not acceptable as members of the conference. The methods which have been adopted from time to time to eliminate competition show the futility of a weak line attempting to enter a trade in opposition to the combined power of the established lines when united by agreement. By resorting to the use of the "fighting ship" or to unlimited rate cutting the conference lines soon exhaust the resources of their antagonists. By distributing the loss resulting from the rate war over the several members of the conference each constituent line suffers proportionately a much smaller loss than the one line which is fighting the entire group. Moreover, the federated lines can conduct the competitive struggle with the comfortable assurance that, following the retirement of the competing line, they are in a position to reimburse themselves through an

increase in rates. To allow conferences, therefore, generally means giving the trade to the lines now enjoying it. Only a powerful line can hope to fight its way into the trade, and with the inevitable result, if successful, that it will join the combination or be allowed to exist by virtue of some rate understanding.

\* \* \* \*

4. *Conference lines, through their monopolistic powers, so completely dominate the shippers with whom they deal that these shippers can not afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances.* This condition is well illustrated by the frequency with which communications, addressed to the committee, referred to the confidential nature of the information furnished. The various lines constituting a conference have the same interests, and their organization is effective. Shippers, on the contrary, live far apart, and because of their different and frequently antagonistic interests can only combine for mutual protection with the greatest difficulty. [Italics ours.]

In another section of the report the committee again referred to the difficulty it experienced in securing witnesses who dared to testify regarding the practice of the pool lines, saying (p. 417):

*A considerable number of complaints were also filed with the committee objecting to excessive rates, discrimination between shippers in rates and cargo space, indifference to the*



landing of freight in proper condition, arbitrariness in the settlement of just claims, failure to give due notice to shippers when rates were to be increased, refusal to properly adjust rates as between various classes of commodities, and the unfairness of certain methods—such as fighting ships, deferred rebates, and threats to refuse shipping accommodations—used by some conference lines to meet the competition of nonconference lines. *Unfortunately the truth of many of these complaints could not be ascertained* because of the confidential nature of the information furnished. As pointed out in the report (p. 306), it seemed to be the general impression among shippers who filed complaints with the committee that the conference lines—

so completely dominate the shippers with whom they deal that these shippers *can not afford, for fear of retaliation, to place themselves in a position of active antagonism to the lines by openly giving particulars of their grievances.*

Referring to the inherent vices of shipping pools, the committee report continues (pp. 417-418):

While admitting their many advantages, the committee is not disposed to recognize steamship agreements and conferences, unless the same are brought under some form of effective Government supervision. To permit such agreements without Government supervision would mean giving the parties thereto unrestricted right of action. Abuses exist, and the numerous complaints received by the com-

mittee show that they must be recognized. \* \* \*

The committee believes that the disadvantages and abuses connected with steamship agreements and conferences as now conducted *are inherent, and can only be eliminated by effective Government control.* \* \* \* [Italics ours.]

### III.

**AS TO THE CONTENTION THAT REASONABLE RATES AND IMPROVEMENTS IN SERVICE ARE EVIDENCE THAT COMPETITION HAS NOT BEEN SUPPRESSED.**

Defendants contend that competition between them really has not been suppressed even as regards rates or service. Rates, they maintain, are no higher than before the combination, and as to service, they maintain that the lines vie with each other in building new and splendid ships. Precisely the same thing was said in behalf of the combination in the *Union Pacific case*, 226 U. S., 61. This court answered, however, that whatever the present effect upon rates and service, the necessary tendency of suppressing competition among competing carriers is to increase rates and to slacken service. Mr. Justice Day said (p. 88):

The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroy-

ing or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. *United States v. Joint Traffic Assn.*, *supra*, 577. It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. *Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected.* It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. *Pear-sall v. Great Northern Railway Co.*, 161 U. S., 646, 676; *United States v. Joint Traffic Assn.*, *supra*. [Italics ours.]

#### IV.

##### AS TO THE WISDOM OF PROHIBITING STEAMSHIP POOLS.

On the question whether the combination here assailed is a combination in restraint of trade, it will be found that the contentions of defendants, while in varying forms, all come to this, namely, that it is economically disadvantageous to prohibit pooling combinations among steamship lines. But that is a question of policy for Congress to decide, and Congress has decided it contrary to the view of the defendants. They discuss the matter as if the ques-

tion were, What *should be* the law? when in fact the question is, What *is* the law?

Every argument which is made here based on the economic expediency and alleged necessity of such agreements amongst carriers was made with double force in the *Trans-Missouri Freight Association* and *Joint Traffic Cases*. For there the parties to the agreement were carriers by railroad, which were already subject to a complete system of statutory regulation, but Congress has made no such provision for carriers by water, and unless they are subject to the Anti-Trust Act they are free, as already stated, to exact by combination any rates within their power and are free likewise to attack any line inclined to pursue an independent course.

Obviously, therefore, this defense having been rejected in those cases, for stronger reason it must be rejected here. See further main brief of Government, pages 107-114.

## V.

### **AS TO THE CONTENTION THAT THE CASE HAS BECOME MOOT BY REASON OF THE EUROPEAN WAR.**

It is suggested in one of the briefs for the defendants that the General Pool Agreement has become, of necessity, suspended by the European war, and that for this reason the case has become moot.

This contention is conclusively answered by the case of *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 308; see also *So. Pac. Termi-*

*nal Co. v. Interstate Commerce Commission*, 219 U. S. 498; *Boise City I. & L. Co. v. Clarke*, 131 Fed. 415 (C. C. A. 9th).

In the *Freight Association Case*, *supra*, the court said (p. 308) :

The prayer of the bill filed in this suit asks not only for the dissolution of the association, but, among other things, that the defendants should be restrained from continuing in a like combination, and that they should be enjoined from further conspiring, agreeing, or combining and acting together to maintain rules and regulations and rates for carrying freight upon their several lines, etc. *The mere dissolution of the association is not the most important object of this litigation. The judgment of the court is sought upon the question of the legality of the agreement itself for the carrying out of which the association was formed, and if such agreement be declared to be illegal, the court is asked not only to dissolve the association named in the bill, but that the defendants should be enjoined for the future.*

The defendants, in bringing to the notice of the court the fact of the dissolution of the association, take pains to show that such dissolution had no connection or relation whatever with the pendency of this suit, and that the association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purpose not to enter into a similar one in the immediate future. On the contrary, by

their answers the defendants claim that the agreement is a perfectly proper, legitimate, and salutary one, and that it or one like it is necessary to the prosperity of the companies. [Italics ours.]

Indeed, much stronger reason exists for not holding the present case moot than existed in the *Freight Association Case*. In the *Freight Association Case*, as shown by the excerpt from the opinion quoted above, the agreement was dissolved by the voluntary action of the parties. The dissolution had no connection with the pending suit and the court might properly have presumed it final. In the present case at most the agreement is merely suspended by force of circumstances. The parties have given no assurance that they will not renew it at the close of the war, but on the contrary insist upon their right to do so, and indeed insist upon the necessity of doing so.

In *United States v. Prince Line*, 220 Fed. 230, precisely the same contention now advanced was rejected by the Circuit Judges of the second circuit.

G. CARROLL TODD,

*Assistant to the Attorney General.*

THURLOW M. GORDON,

*Special Assistant to the Attorney General.*

NOVEMBER, 1915.





# In the Supreme Court of the United States.

OCTOBER TERM, 1914.

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THE UNITED STATES, APPELLANT, v. HAMBURG-AMERIKANISCHE PACKET-FAHRT Actien-Gesellschaft et al.	}	No. 702.
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HAMBURG-AMERIKANISCHE PACKET-FAHRT Actien-Gesellschaft et al., appellants, v. THE UNITED STATES.	}	No. 784.
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APPEAL AND CROSS-APPEAL FROM THE DISTRICT COURT OF  
THE UNITED STATES FOR THE SOUTHERN DISTRICT OF  
NEW YORK.

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## MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General, and in accordance with the provisions of the Expediting Act, 32 Stat. 823, as amended by the Act of June 25, 1910, 36 Stat. 854, respectfully moves the court to advance the above-entitled causes for hearing on a day convenient to the court during the ~~past~~<sup>next</sup> term.

This is a proceeding in equity by the United States under the Act of Congress of July 2, 1890,

ships," but the bill was dismissed as to other prayers for relief on the ground, *inter alia*:

That the contract and methods employed by defendants, outside of the "fighting ships," as alleged in the petition, did not constitute an "unreasonable" or "undue" restraint of trade within the meaning of the Antitrust Act as construed in the decisions of this court in the cases of *Standard Oil Company v. United States*, 221 U. S. 1, and *United States v. American Tobacco Company*, 221 U. S. 106.

The decision is one of general public importance, and it is believed that the questions involved should be settled as promptly as possible.

Opposing counsel concur.

JOHN W. DAVIS,

Solicitor General.

*May*  
~~JANUARY~~, 1915.

Office Supreme Court, U. S.

FILED

NOV 3 1915

JAMES D. MAHER

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 289

THE UNITED STATES OF AMERICA, Appellant,

v.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT, *et al.*

No. 332

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT, *et al.*, Appellants,

v.

THE UNITED STATES OF AMERICA.

BRIEF FOR AMERICAN, ANCHOR, DOMINION, HOLLAND-AMERICA,  
RED STAR AND WHITE STAR LINES AND DEFENDANTS  
COVERLY, FRANKLIN AND GIPS, APPELLEES

BURLINGHAM, MONTGOMERY & BEECHER,  
Solicitors for American Line, Anchor Line,  
Dominion Line, Holland-America Line,  
Red Star Line, White Star Line, and  
Defendants Coverly, Franklin and Gips.



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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 289.

THE UNITED STATES OF AMERICA, Appellant,

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HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
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THE UNITED STATES OF AMERICA.

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BRIEF FOR AMERICAN, ANCHOR, DOMINION,  
HOLLAND-AMERICA, RED STAR AND  
WHITE STAR LINES AND DEFEND-  
ANTS COVERLY, FRANKLIN AND GIPS,  
APPELLEES

STATEMENT

The above named defendants do not appeal from the decree of the District Court, but are here solely as appellees.

The bill was filed January 4th, 1911, in the Circuit

Court for the Southern District of New York, against thirteen Steamship Companies, six of which are British corporations, one Canadian, two German, one Dutch, one Belgian, one Russian, and one, the International Mercantile Marine Company, is a New Jersey corporation. The individual defendants are the New York agents of the several lines.

The bill is summarized at pages 12-18 of the Government's brief. What the Government considers to be the substance of the defense is stated at pages 38-9 of its brief. The answers of the appellees in whose behalf this brief is filed are at 11 R. 66-122.

The substance of the defense detailed in these answers is—and we shall argue here—that neither on the face of the Conference agreement nor in its purposes or effects is it contrary to the Sherman Act; that, so far from being detrimental to the public interest, it is beneficial to the public as well as to the Steamship Lines and is a necessary method of conducting the steamship business; that steorage rates under this agreement are not excessive, but, on the contrary, are reasonable; that the oppressive and illegal acts charged by the Government (which we shall show have not been proved) have no necessary connection with the Conference agreement and in no way affect its validity.

In making this argument we shall keep constantly in mind the guiding principles enunciated by the Chief Justice in the *Standard Oil Case*, namely, that if a contract unduly restrains trade and thus falls within the



condemnation of the Sherman Act it cannot be excepted from its operation by a finding that it was a reasonable contract; that in determining whether the contract is in fact prohibited by the Sherman Act it is proper to consider the facts surrounding its making, as well as the character of the parties; and that injury to the public is the foundation upon which the prohibitions of the statute rest. 221 U. S. 1, 65, 67, 78.

#### THE DECISION OF THE DISTRICT COURT

The opinion of the District Court by Lacombe, C. J., is at 10 R. 5127-33, and is reported in 216 Fed. Rep. 971. It is based on the decisions of this Court in the *Standard Oil Case* and the *American Tobacco Case*. Judge Lacombe said (fols. 15387-8):

"To determine whether any particular course of conduct is or is not 'undue' or 'unreasonable,' involves, of course, a consideration of all the surrounding circumstances, which may be multifarious."

He observed that under the same state of facts different decisions might be arrived at as to the reasonableness of certain transactions. As to the facts of this case he found (fols. 15391-3) that fighting ships constituted an unreasonable method of conducting the business. He said (fols. 15393-4) that the testimony did not satisfy the Court that any of the defendants had charged excessive or exorbitant rates for the transportation of passengers "especially when it is considered that vastly more in the way of safety,

speed, sanitary conditions, physical comfort, etc., is now given to the passenger than was given to him before these agreements and conferences were entered into". As to the Government's argument with respect to agents he found (fols. 15394-5) that this method of business was unobjectionable, dealing, as it did, "merely with the control of defendants' agents, who are free to accept or decline such agency", and said that in view of the deplorable conditions which existed before it was adopted "it would seem that such an arrangement has greatly benefited the travelling public". On the main subject matter of the controversy, the controlling of transportation so as to allow proportionate shares to the different defendants, he found (fols. 15396-8) that the method adopted by the defendants "is a reasonable one, which so far from restraining trade really fosters and protects it by giving it a stability which insures more satisfactory public service for all concerned".

The Government suggests (Brief, pages 118-24) that the District Court fell into the error pointed out by this Court in the *Standard Oil Case*, by seeking to remove from the prohibitions of the statute acts which the statute prohibited, by a finding that they were reasonable. We confidently assert that this suggestion can only arise from an utter misapprehension and misunderstanding of the District Court's opinion. Judge Lacombe makes it perfectly clear that his words "course of conduct" refer to the making of the agreement in suit, as well as the acts of the defendants under and outside of that agreement. Thus at fol. 15396 he refers

to "the controlling of transportation so as to allow proportionate shares of it to the different defendants," etc., and at fol. 15381 he refers to "the various agreements and conferences which together constitute the combination."

#### THIS HAS BECOME A MOOT CASE

Before proceeding to our argument we deem it proper to direct the attention of the Court to the fact that by the operation of events, as well as by the terms of the agreement itself, the agreement is now dissolved, and there seems to be no longer a subject matter of controversy. As the bill shows, among the parties are corporations of Great Britain, Germany, Belgium and Russia, countries now at war, by reason of which the agreement, being in effect a partnership between these corporations, is absolutely at an end and all further transactions under it are void and illegal. All commercial intercourse between these parties has been prohibited, as can be judicially noticed. *Montgomery v. United States*, 15 Wall. 395; *United States v. Lapène*, 17 Wall. 601; 7 Moore's International Law Digest, 244, 250. In *United States v. Prince Line*, 220 Fed. Rep., 230, 231, 234 Lacombe, C. J., in the District Court for the Southern District of New York, said that a similar agreement between British and German corporations had been practically dissolved by the war, and suggested that the decision of the case was not a determination of live issues, but merely the performance of an autopsy. Under articles 23, 24 and 25 of

the agreement, 1 R. 67-72, many things are to be performed in England and in Germany, where obviously they cannot now be performed. By article 27, 1 R. 73, the withdrawal of any Line from the contract releases all other Lines from all future obligations unless the latter agree among themselves to continue the contract.

We need not argue at length that ordinarily this Court will not entertain moot cases or cases in which the issues have already been settled by lapse of time or otherwise. See *Richardson v. McChesney*, 218 U. S. 487; *Bucks Stove etc. Co. v. American Federation of Labor*, 219 U. S. 581; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 451; *Wingert v. First Natl. Bank of Hagerstown*, 223 U. S. 670; *Little v. Bowers*, 134 U. S. 547; *Board of Flour Inspectors v. Glover*, 160 U. S. 170; *California v. San Pablo & T. R. Co.*, 149 U. S. 308; *San Mateo County v. Southern Pacific R. R. Co.*, 116 U. S. 138; *Mills v. Green*, 159 U. S. 651; *Jones v. Montague*, 194 U. S. 147. This case is not like *United States v. Freight Association*, 166 U. S. 290. There, as Mr. Justice McKenna said in *Southern Pacific Terminal Co. v. Int. Comm. Comm.*, 219 U. S. 498, 515, there was an attempt to defeat the purpose of the suit by a voluntary dissolution of the agreement. Here the dissolution took place by operation of law without any act or fault on the part of the defendants.

These defendants, however, do not seek to avoid the decision of this Court if the Court is of opinion that the appeal may properly be entertained.

## RESULTS OF CONGRESSIONAL INVESTIGATION OF THE MATTERS NOW BEFORE THIS COURT

At the outset of our discussion of the merits we refer to the investigation of the Committee of the House of Representatives on the Merchant Marine and Fisheries under House Resolution 587, 62d Congress, 2nd Session. The resolution directed the Committee "to make a complete and thorough investigation of the methods and practices of the various ship lines \* \* \* engaged in carrying our oversea or foreign commerce \* \* \* and the connection between such ship lines and railroads \* \* \* and to investigate whether any such ship lines have formed any agreements, understandings, working arrangements, conferences, pools, or other combinations among one another, or with railroads, \* \* \* for the purpose of fixing rates \* \* \* or for the purpose of pooling or dividing their earnings, losses, or traffic, or for the purpose of preventing or destroying competition; \* \* \* and said committee shall further investigate whether the conduct or methods or practices of said foreign steamship lines are in contravention of our commercial treaties, *or in violation of our laws*, and what effect said methods and practices have on the commerce and freight rates of the United States; and shall further investigate what effect such combinations, agreements, understandings, working arrangements and practices \* \* \* of railroads and oversea shipping lines, \* \* \*, if any are found to exist, have on the commerce and freight rates of the United States, and *whether the same are in violation of the laws of the United States.*" (Italics ours.)

The Committee particularly considered the Conference agreement here in suit and investigated the workings of similar agreements throughout the whole steamship world, and the entire investigation was made with

a thoroughness that probably has not been surpassed in any Congressional investigation. Substantially all of the evidence in this suit was before the Committee. The conclusions and recommendations of the Committee are given at pages 415-421 of Volume 4 of its report. At pages 416-7 the Committee says:

"It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. *To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement.* Moreover, steamship agreements and conferences are not confined to the lines engaged in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of cooperative arrangements, and to restore open and cut-throat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors. (Italics ours.)

"Steamship line representatives, as well as the patrons of the lines, were almost a unit in emphasizing to the Committee the importance and necessity of the

aforementioned advantages of agreements and conferences, and in asserting that these advantages can only be effected by permitting the several lines in a given trade to co-operate in the regulation of their rates and the expeditious handling of their business. Very few of the many exporters and importers, who communicated with the Committee, were opposed to agreements and conferences in themselves, provided they are fairly and honestly conducted."

The Committee expressed decided views against abolishing steamship agreements and conferences. Although it was specifically directed to investigate whether these agreements were in violation of our laws its report contains no suggestion that such agreements are contrary to the Sherman Act, and in its recommendations the Committee expressly recommends that in order to retain the advantages of these agreements and prevent the abuses complained of they be placed under supervisory control. This is very far from saying that they violate our laws. We emphasize the conclusions of the Committee for the bearing they have on the purpose and necessity of the Conference agreement. The Court below found this report "most persuasive to the conclusion that, *in view of the peculiarities of ocean transportation, the method adopted by the defendants—if purged of its obnoxious feature, the fighting ship—is a reasonable one, which so far from restraining trade really fosters and protects it by giving it a stability which ensures more satisfactory public service for all concerned*" 10 R., 5133, fol. 15397. (Italics ours.)



## FIRST POINT

THE PURPOSE OF THE CONFERENCE AGREEMENT WAS TO PREVENT THE DEMORALIZATION OF OCEAN STEERAGE TRAFFIC AND DESTRUCTION OF THE WEAKER STEAMSHIP LINES WHICH WOULD RESULT FROM RATE WARS AND UNRESTRICTED COMPETITION.

The Government asserts (Brief, page 18) that the fixing of rates is the primary purpose of the Conference agreement. This is hardly true. Rate fixing is only a means of avoiding ruinous competition. The gist of the entire agreement is found in Article I, which reads:

"The Companies before named guarantee to each other the percental participation, as defined and provided for in Article 3 of this Contract, of the entire steerage traffic forwarded by the parties to this Contract from all European Ports to and via the United States of America and Canada and *vice versa* in vessels owned, leased, chartered or controlled by them without regard to the flag. Excepted are Italian and Oriental passengers forwarded by direct steamers through the Straits of Gibraltar (Oriental passengers mean passengers to or from Greece, Africa and Asia)"  
1 R. 51.

Every other material provision of the agreement is directed to the fulfillment of this purpose. The agreement does not purport to apportion the entire steerage traffic of the North Atlantic, but only the traffic "forwarded by the parties to this contract." It fixes the percentage of steerage passengers to which each line

is entitled, and provides for payment by a line of compensation for steerage passengers carried in excess of its agreed percentage and for compensation to a line carrying less than its percentage.

The Government has adduced no evidence as to the purpose of the agreement except as it would have purpose inferred from the acts alleged, and has contented itself with the rather frequent characterization of these acts as conspiracy and monopoly. But monopoly inappropriately describes combination under the agreement. It cannot be said that the motive of the defendant lines was to gather to themselves the entire steerage traffic or to drive others lines out of business. They already had virtually the entire steerage traffic and, practically speaking, there were no other lines to be driven out. See *United States v. Winslow*, 227 U. S. 202, 216-8. For many years prior to the agreement of February 5, 1908, the defendant lines had done business side by side, both under express and tacit agreements of the same nature. The agreement did not effect a consolidation of separate interests.

In considering the purpose of the agreement it should be remembered that the defendant lines serve different European ports and that geographically they are not all natural competitors for all traffic. The British lines principally serve Liverpool, London, Southampton and Glasgow; the German lines, Hamburg and Bremen; and the Holland-America Line, Rotterdam. It is therefore not unnatural that the lines should desire—and the Conference agreement is

only the natural outgrowth of this desire—to secure to themselves such fixed proportions of the traffic as experience shows they may reasonably expect to carry by their respective lines to and from the ports at which for many years their respective businesses have been principally centered. If all the lines ran between the same ports a different situation might arise.

The more immediate reasons for making the conference agreement arose from unrestricted competition, rate wars, and the consequent demoralization of ocean trade and destruction of the weaker lines. Mr. Franklin testified, 13 R. 1798:

“Q. You say you have operated under this agreement ‘AA.’ Just prior to the signing of that agreement in February, 1908—I think it was—February 5th, 1908—what was the condition of things in the steamship business? A. A very serious rate war had been in existence.

Q. For how long? A. I would say, about six or eight months—I believe longer than that.

Q. Did you take any part in that? A. I took part in it and I was at that time representing the lines in the United States.

Q. Describe in a general way what the situation was. A. The situation was such that the rates for third-class passengers were reduced to a basis of ten dollars and in some cases as low as \$7.50, which rate included not only the commission but the head tax which was paid out to the Government—being an absolutely demoralized condition of affairs.

Q. It is hardly necessary to ask whether there was any profit in such business? A. That meant that the third-class business was carried at a very serious loss.

Q. Do you know what led to the formation, or the

execution of this new agreement in 1908? A. Well, it was unreasonable for the lines to continue such a ruinous fight."

Mr. Lister, of the Cunard Line, testified, 13 R. 1495-7, that for twenty years there had been a series of conferences, practically continuous (fol. 4484), in some of which the notice to terminate was only fourteen days, the result being that any party with a grievance flew to the notice clause and made chaos of the whole business, leading to rate wars and the breaking of all regulations for the conduct of the business (fols. 4485-6); and that Agreement AA was made to "insure more stability in the business" (fol. 4487). He testified (fols. 4488-9):

"Q. Can you state what the effect of rate wars has actually been on the business of the lines? A. The most disastrous effect, not only on the business of the lines, but on everybody concerned; disastrous to the lines in that a very low rate was in operation, disastrous to the passenger in that he did not get all of the comforts that it might have been possible to have given him under different conditions, and disastrous also to the United States, because it encouraged a lot of agents whom the lines, in other times except rate wars, had weeded out of the business drifting in again to the business and endeavoring to book a lot of totally undesirable emigrants."

Mr. Lister further testified that in rate wars he had known third-class rates to be down to £2. and that one line went down to 30 shillings, which meant that a steamship company was doing business at a loss (fol. 4490).

Mr. Cauty, of the White Star Line, particularly

well qualified to discuss steerage traffic and steamship business generally, testified very fully as to the reasons for Agreement AA, 12 R. 1090-5. We quote from his testimony at fols. 3271-5:

"Our first agreement we have any record of dates back to 1880, when there was a Scandinavian pool established, which lasted for a short period, I do not remember how long. But from 1880 to 1888 various agreements were in existence, and from 1889 to 1895 was a very strenuous time in the North Atlantic trade. All agreements went by the board, and this period was one of keen competition between all the Atlantic lines. Each line did what they thought best, and rates went down to an absolutely unremunerative level.

Q. Such as, for example? A. Well, I think it went down to £2. I think the rate that Mr. Ismay mentioned is one that has been resorted to in a subsequent rate war. I think we went down to £2. I believe it was 30/—, but I am not sufficiently sure about it to make the statement definitely, but I can safely say £2, and I think the result of this competition is very instructive, because if we look at the list of companies who were engaged in the Atlantic trade in 1880 and those who were left in after this rate war, we find there were a good many names missing. The Inman Line went into liquidation. The Beaver Line got into very serious difficulties, and was subsequently bought up. The Guion Line and the National Line went out of the business. The Warren Line started carrying passengers, but also went out of business, and the State Line was subsequently amalgamated with the Allan. All these troubles arose, I may say, during those six years or thereabouts, and I think the lesson we have to learn from time is that if these conditions had been continued, they had only to be continued long enough for the Atlantic travel and the whole Atlantic trade to be left in the hands of one or two of the strongest companies. When the lines

got together in 1895 we do not find any line then standing back. We find everybody very, very anxious to remedy this very unfortunate state of affairs. The lines then got together, and that first agreement in regard to Continental business which has been put in as evidence which allotted the British lines a share of the Continental business, was arrived at, and I may say that that is really the foundation stone of our present agreements. It is true the negotiations have not proceeded along a smooth path always. We have had breaks in our peaceful relations, in 1903 to 1908 we were again more or less at loggerheads with one another. But the fight in those days was comparatively a short one. We only got to reducing rates towards the end of the period, and it was in 1908 that our present agreements were established."

Mr. Cauty is corroborated by Mr. Hannah of the Allan Line Steamship Company, 13 R. 1436-8.

The purpose of the agreement as thus declared by those most competent to know would seem to have been honest and commendable. So far from being an attempt at monopoly, its tendency is to the contrary. It can hardly be doubted that some of the stronger steamship lines, parties to the agreement, could by ruthless competition, had they so desired, have driven out of business the weaker parties. Had monopoly been the object, an agreement whereby the weaker lines were assured of life by being given a certain percentage of traffic, and whereby lines overcarrying were to make compensation to those undercarrying their percentages, would appear to have been about the most ineffective means that could have been chosen to accomplish the desired result.

## SECOND POINT

THE PURPOSE OF THE CONFERENCE AGREEMENT AS THUS SHOWN AROSE FROM A REAL NECESSITY, PROVED BY THE TESTIMONY OF STEAMSHIP MEN OF THE WIDEST EXPERIENCE AND THE GOVERNMENT'S OWN WITNESSES.

Necessity is the first law of any business. But the Government takes no account of this. Having instituted this suit before the decision in the *Standard Oil Case*, it has proceeded throughout on the theory that if any restraint of trade could be shown, whether the public were thereby injured or not, its case would be established.

Nevertheless, this Court will not find the methods of the defendants in conducting their business improper unless some other method less prejudicial to the public can be shown. This country has been and is now almost entirely dependent for its freight and passenger transportation on foreign steamship lines. The welfare of the country demands that the steamship business be conducted and maintained with a high degree of efficiency, and that it be neither hampered nor destroyed.

In considering the questions submitted the Court will bear in mind that conditions on the ocean are entirely different from those on land. Indeed, in this case the physical and geographical conditions are such that the Conference agreement cannot create a monopoly. It is utterly beyond the power of the Conference Lines to keep other lines off the seas



or out of the ports, and they have not sought to do so. Given the requisite capital and ships, a new line may in normal times establish itself in business any day and secure such traffic as the natural competition between the total number of lines afloat for the total traffic will permit.

The positive and unanimous opinion of the steamship men who testified, whether witnesses for the Government or for the defendants, based upon experience and reasoning which demand respect, is that Agreement AA and similar agreements are absolutely necessary to the favorable conduct of the steamship business, both from the point of view of the lines and of the public. Mr. Richard, 40 years in the business, who represented various non-conference lines, 12 R. 790, fol. 2369, testified, 12 R. 938, fol. 2812:

"And I was going to say before that if the Court should hold this working agreement illegal the commissioner of general emigration of the United States or some such commissioner as the Interstate Commerce Commission will have to be empowered to fix rates also, otherwise some of the steamers, if not some of the lines, especially the weaker lines, will have to go out of business entirely, with the result that commerce between the United States and Europe will be curtailed."

At page 929, fol. 2786, Mr. Richard said the Conference was good for the weak lines because it protected them and put them on a parity with the stronger lines.

Mr. Cauty, in the business since 1886, 12 R. 1046, said, 12 R. 1096-7, fols. 3287-90:

"My own opinion is undoubtedly that we could not continue to maintain the business on a satisfactory nor-

mal level without agreements. I do not think it is possible, the jealousies of the different lines and the different interests are too keen, and given that unrestrained competition and low rates there is only one conclusion that one could expect, and that is the elimination of all the weaker lines and the monopoly in the hands of the stronger lines.

\* \* \* \* \*

"Q. What effect do you think that would have upon the character of the services rendered to the traveling public? A. I think the services rendered to the traveling public would be very much curtailed.

\* \* \* \* \*

"Q. And frequency of sailings? A. And frequency of sailings and accommodation on board ship would all suffer. In fact, I think that those who cross the Atlantic, those mercantile interests which require constant communication across the Atlantic, would all be very seriously prejudiced by a termination of rate agreements, pooling agreements, between the lines."

Mr. Hannah, 45 years in the business, 13 R. 1432, after stating that he believed it absolutely necessary that there should be understandings among steamship lines by way of regulating competition, said, 13 R. 1436, fols. 4307-8:

"Q. Now go on and tell me why from your experience you believe it necessary? A. The Inman Company, with which I was identified from 1869 until it went out of existence, was at one time one of the most prosperous lines, and it was followed into business by the National Line, established to do the same class of business, and later by the Guion Line. Those three lines were strong lines in the trans-Atlantic trade. They all perished because of unregulated competition. I might add to that also the Monarch Line, which came into business later, and still later the State Line.

So there are five lines that perished in the trans-Atlantic trade. Five out of eight British lines that did not survive."

At page 1449, fol. 4347, Mr. Hannah gave it as his opinion that a line could not be maintained without some stability of rates, and said, page 1450, fol. 4348:

"Many a voyage has been made when the total returns of the voyage are not half of the amount of the disbursements, and the lines kept on as long as they could, hoping that times would change and things would improve and rates would be better and largely from the fact of disagreement amongst themselves and the strong trying to oppress the weak they went out of existence."

At pages 1465-6, fols. 4395-6, Mr. Hannah said:

"Q. The condition which you have spoken of under the conference I think you have said protects the weaker lines, does it not? A. Yes, by a differential rate.

Q. That is, the weaker lines are able to live, whereas they could not live if there wasn't those agreements; is that the idea? A. Exactly, that is the idea.

Q. And those agreements also contemplate, do they not, a certain fixity or stability of rates? A. Yes, they do; stability of rates."

Mr. Lister, 21 years in the business, 13 R. 1493, testified, 13 R. 1517-8, fols. 4549-50, 4552:

"Q. From your experience in the steamship business can you state whether it is possible, under present conditions, to maintain a passenger line from Europe to the United States which shall comply with the requirements of statute in England and in the United States and with the demands of the public unless the

passenger rates are practically stable? A. It is absolutely impossible.

\* \* \* \* \*

"Q. From your experience in the steamship business can you state whether it is possible in the North Atlantic passenger trade to maintain stable rates without agreements between the lines? A. You cannot maintain stable rates without agreements between the lines.

Q. And have the lines ever been able to make stable rates without agreements between themselves? A. Never."

After stating his opinion that if agreements between the passenger lines were prohibited the business would become demoralized, Mr. Lister said, 13 R. 1563-4, fols. 4689-90:

"Q. Would such a condition, in your judgment, lead to losses which would result in the retirement of some lines? A. I think it would. You would find that the lines, if there were no agreements, for a time would try and keep a fairly average rate for the carriage of their passengers, but if one line saw then that it was not getting its passengers against another line it would naturally tend to reduce rates and then the battle would be to the strongest, of course."

He continued, fol. 4691, to the effect that the steamship companies themselves, in the absence of any government on the ocean, tried to devise rules for carrying on business and controlling the conditions of traffic on the sea just as a country devises laws for the conduct of passengers and traffic on land, a sort of local self-government of the sea. He said, fol. 4692, that stable rates were every bit as important to the public as to

the steamship lines. As bearing on the relation of Agreement AA to the building of new ships, Mr. Lister testified, 13 R. 1502, fols. 4504-6:

"Q. Can you state what effect the making of the AA agreement had in making possible the ordering of those ships? A. Yes, I think I can say that with the AA Agreement behind them the steamship companies felt that they could embark out and build new ships. It is perfectly obvious that if there was no stability in the business we could not embark out and put a lot of capital in new ships. You might enter an agreement which was subject to fourteen days, or even a month's notice, and at any time you might order a ship costing a very large sum of money and directly you have ordered that ship they get a rate war and the natural disorganization that follows a rate war would—we launch the new ship at a time when it was bound to be a most unprofitable undertaking. With the AA agreement the lines feel they have something behind them which enables them to build these new ships, to obtain all the improvements that time shows and to provide better transport for the passengers."

Mr. Franklin, in the business since 1891, 13 R. 1796, testified as follows, 13 R. 1799-1800, fols. 5396, 5397-8, 5399:

"I do not see how the steamship passenger business can be conducted satisfactorily without agreements, just as any other transportation business. It requires agreements.

\* \* \* \* \*

"The necessity is exactly the same as the necessity in the case of the railroads. If the railroads or the steamboats did not have these agreements all the best trains would get all the business and the largest steamers would get all the business and it would mean the survival of the fittest and the man who could put

out the greatest number of steamers could control the business.

\* \* \* \* \*

"Q. I want to know what, generally, in your opinion, is the reason for establishing a system similar to 'AA' for third-class passengers? A. If we did not have an agreement similar to 'AA' the line that could put in, from year to year, new steamers, would gradually absorb all the business. The agreement 'AA' gives and retains for the weaker lines their share of the business that they have established."

Speaking of the American Line, he said, 13 R. 1806, fol. 5416:

"Q. What do you say as to the effect on that line of a rate war—a period without agreements among the lines? A. The effect upon that line would have been—a continuation—a rate war would have been a very serious proposition for that line to fight—to have faced.

Q. Why? A. Because it is not a profitable service now and under these conditions they would be running at a very heavy loss."

The cost of ships built in American yards is 40 per cent. greater, and the cost of operation under the American flag is about 30 per cent. greater than the cost of building abroad and of operating foreign ships. As to running such ships without agreements, Mr. Franklin said, page 1808, fols. 5422-3:

"It would be more difficult for a steamer built in America under the American flag to compete with a foreign flag steamer without an agreement, because the American steamer is operating under a very great handicap at any rate.

Q. Such as you have described? A. Such as I

have described; in the cost of construction and cost of operation. Now, if she has got to be under a further handicap it is an absolutely impossible proposition."

Speaking broadly as to all lines, Mr. Franklin said, 13 R. 1810, fols. 5430-2:

"Q. Mr. Franklin, from your experience in the steamship business, do you think it possible for passenger lines to be run on the North Atlantic route now in a manner which would conform with statute in the United States and England and which would conform to the requirements of the public unless passenger rates are relatively stable? I mean, for any considerable period of time? A. You could run them, but you would be running the risk of incurring heavy losses; therefore, it depends upon your financial arrangement as to how long you could run them.

Q. Could passenger lines now operating in the North Atlantic be run for any considerable period of time in the manner that the public now require unless the passenger rates were relatively stable? A. Those of the stronger lines that have large interests elsewhere could be run indefinitely, but the weaker lines depending upon the results of operating across the North Atlantic would have to drop out unless reasonable and stable rates were maintained."

Q. Is there any method by which reasonable and stable rates—passenger rates—can be maintained on the high seas, except by agreement of some sort between the lines? A. Not in my opinion."

Referring to the improvement in the quality of steamers, he said, page 1813, fol. 5439:

"The present magnificent steamers would probably not have been constructed if it had not been for the passenger agreements that existed from time to time."



Mr. Winter, in the business since 1885, 13 R. 1730, testified 13 R. 1740, fol. 5218:

"Every rupture we have had has practically had a tendency to bring us together again with a view of establishing stable rates and stable conditions. Without them we cannot favorably conduct the business."

Mr. Straus, in the business 25 years, 12 R. 735, testified 12 R. 773, fol. 2319:

"Q. Now, without some conference agreement, some arrangement between the lines, would it be possible for the lines to build up the present fleet of steamers, differing from your own fleet and retain the regularity of service? A. I don't think it would be possible."

And at page 775, fols. 2324-5:

"Q. Then it would not be possible for steamship lines to maintain the present type of steamer and regularity of sailing, consisting of a steamer almost every day? A. I don't think it would be possible for them to keep it up."

Coming from men of such character and experience, this testimony would in any event be entitled to very great weight. It is, of course, such testimony as men closely identified with the making and administration of Agreement AA would naturally be expected to give. But the testimony is positively corroborated and supported by the unanimous conclusions of the Committee on the Merchant Marine and Fisheries of the House of Representatives, quoted *supra*, page 8.

Against the weight of all this testimony as to the

necessity and purpose of the Conference agreement the Government has produced no evidence and now finds itself obliged to rely solely on the legal proposition that mere agreement on rates and pooling are illegal. We submit that proved facts cannot be overcome by the mere assertion of legal propositions.

### THIRD POINT

IN CARRYING OUT THE CONFERENCE AGREEMENT THE DEFENDANTS HAVE NOT CHARGED UNREASONABLE OR EXCESSIVE RATES AND HAVE NOT IMPAIRED THE STANDARD OF SERVICE. ON THE CONTRARY, THE RATES ARE AFFIRMATIVELY SHOWN TO BE REASONABLE AND THE SERVICE TO BE IMPROVED.

The Government makes no proof whatever about service. In the Court below it sought strenuously to show that the steorage rates charged were unreasonable and excessive, but apparently has now practically abandoned that attempt. In this Court it contents itself with a foot-note (Brief, page 117) to the effect that certain methods of testing the reasonableness of rates are inconclusive, and with stating that there are grounds for regarding existing rates as excessive. It is undeniably difficult to determine the reasonableness of rates, but the burden is on him who challenges their reasonableness. *Interstate Commerce Commission v. Chicago G. W. Ry.*, 209 U. S. 108, 120.

The Government now asserts (Brief, pages 2 and 115) that it is unnecessary to show that the rates are unreasonable, and practically rests its entire case for cancellation of the agreement (except as to three collateral matters which we shall discuss in our next point) upon the proposition that any agreement on rates is prohibited by the Sherman Act.

The Government's virtual silence as to service and rates is in itself a strong argument for the defendants. We shall, however, show affirmatively that under the Conference system the rates have been reasonable and the service improved, for these facts have a bearing on the purpose of the agreement and show the absence of injury to the public interest. The reasonableness of rates depends to a large extent on the character of the service and the testimony as to both rates and service is closely correlated.

In the Court below the Government took the position that \$21 was a profitable steerage rate. This is the figure to which rates were reduced in the competition between the Conference and non-Conference Lines. Fourman, 11 R. 569, fol. 1707. For the purpose of the Government's argument with respect to fighting steamers this was the low rate which caused the other lines "serious losses" and forced them out of business. Now, either that rate is profitable or it is not. If it is, the non-Conference lines must have given up business for some other reason than low rates made by fighting steamers. If it is not, and the non-

Conference Lines were forced out by such a rate, it cannot be argued now that higher rates are excessive.

Mr. Winter of the Cunard Line testified, 13 R. 1750, fols. 5248-9:

"Q. Supposing you had a five thousand ton boat and carried one thousand passengers on that boat at a \$21 rate, that rate would not necessarily result in a loss? A. It might.

"Q. Not necessarily? A. The probability would be that it would. One single trip cannot determine the reasonableness of a rate. That is quite impossible. Because you carry one thousand immigrants, that would not enable you to run a boat successfully.

"Q. From your experience it is possible for you to make a profit? A. Not unless the first and second-class cabins and freight would combine to do it.

"Q. Take the ordinary voyage? A. No—\$21 would not bring a profit."

Mr. Hannah said, 13 R. 1478-9, fols. 4434-5:

"It is pretty difficult to determine just the loss on a steerage passenger, because, no doubt, as Mr. Ismay or someone else explained, the total earnings of the steamer are taken, the earnings from the cargo, from cabin passengers and second cabin passengers and steerage passengers that take the trip, the voyage, we will say that is all added together; the disbursements for the voyage of the steamer is taken on the other side of the same book and it is either a profit or a loss. A ship may have a large passenger list and still have a loss if she has practically no cargo. So it is very difficult to answer that question yea or nay. It depends on other conditions, whether they would be profitable or unprofitable. For instance, I should think it would be very much better to have a thousand passengers at \$25 apiece than one hundred passengers at \$35 apiece."

Mr. Thomas said, 12 R. 663, fol. 1987:

"Passengers can be carried on *certain classes* of ships from \$20 up and make money." (Italics ours.)

"Q. Everything depends on the kind of ship it is?"

A. You could not carry them on the *Lusitania*."

And Mr. Straus said, 12 R. 774, fol. 2322:

"You will have to have a large number of passengers in order to make any profit out of a rate like \$20. The ship must be practically full."

Mr. Thomas said, 12 R. 651, fol. 1953, that the cost of carrying steerage passengers by the Uranium Line was "around about \$12"; but at pages 676-7, fols. 2027-9, he testified as follows:

"Q. Now what are the elements again that you have taken into consideration in arriving at your estimate of the cost of carrying steerage passengers, New York to Rotterdam and Rotterdam to New York? A. All of the items, all of the expenses that the ship is put to in carrying those passengers; in other words suppose that ship carried nothing but cargo, there would be no expense at all for passengers; all the additional expense she is put to in carrying passengers, such as stewards, feeding these passengers and stewards, the upkeep and care of the passenger department, but that does not cover the running expenses of the ship, such as the steamship expenses.

"Q. The coal? A. Does not cover the coal, does not cover the crew, except the stewards; does not cover any of the officers, does not cover the insurance, does not cover any port expense, does not cover the depreciation. According to our disbursements account it might show \$20 a passenger profit and yet the ship might make a large loss."

And Mr. Cauty testified, 12 R. 1070, fols. 3209-10:

"It varies a great deal according to the number of passengers carried on ship. That does not take into account what we call the steamship expenses, coal, the upkeep of the ship, the engine repairs, insurance, etc."

And at page 1076, fols. 3227-8:

"Q. What elements of cost have you left out of that calculation? A. Well, we have left out the insurance of the ship, for instance, to which all the earnings must contribute. We have left out the establishment charges on shore. We have large offices to maintain. We have left out the running expenses of the ship, the payment of the crews of the deck and engine department, the engine department repairs, and the cost of the coal. I think that is about all that I can think of at the moment.

"Q. Have you taken into consideration the salaries of the various officers? A. No. We only take into consideration the victualling department expense; that is to say, the stewards' wages when actually attending on the people."

The average steerage rate is taken by the Government to be about \$35. It has fluctuated between that figure and \$30. Winter, 13 R. 1749, fol. 5247. In April, 1908, the lines of the International Mercantile Marine Company reduced their Continental rate to \$28, 7 R. 3341, fol. 10022. In July, 1909, the American Line reduced both its British and Continental rates, 8 R. 4106, fol. 12317. Mr. Hannah said the highest rate of the Allan Line was \$31.25, 13 R. 1445, fol. 4334.

This rate is lower than the rate of the early days.

Hannah, 13 R. 1440, fols. 4318-9; Richard, 12 R. 932, fol. 2794. Never before has the steerage passenger got so much for his money as now. Lister, 13 R. 1506, fol. 4518; Franklin, 13 R. 1829, fols. 5486-7; Winter, 13 R. 1740, fol. 5219. Yet during the last twenty-five years the expenses of maintaining steamship service, including ship building, wages and provisions and expenses imposed by Government requirements have increased very largely. Lister, 13 R. 1507-14; Hannah, 13 R. 1443, fol. 4328. Mr. Franklin said that the cost of operation with respect to every line, every class of passenger and every part of the business had increased tremendously in the last three years. 13 R. 1803, fol. 5409.

The record contains no end of expert testimony as to the reasonableness of rates. Mr. Richard said: "They are very reasonable." 12 R. 814, fol. 2440. He said that the test of a reasonable rate was the dividends the different companies pay. 12 R. 828, fol. 2483. He also said that he considered \$20 an unreasonable rate, and that if such a rate were made the lines would be forced to suspend numbers of their sailings. 12 R. 821, fol. 2462.

Mr. Straus, said:

"A fair reasonable rate in my judgment for third class passengers would be from \$35 to \$40." 12 R. 774, fol. 2322.

Mr. Hannah said: "I think they are very reasonable considering what is done for the passengers." 13 R. 1445, fol. 4333.



Mr. Franklin testified:

"I consider them extremely reasonable, and I think the recent increased costs justify a further increase in the rate." 13 R. 1829, fol. 5486.

Mr. Lister said: "They are reasonable." 13 R. 1518, fol. 4553.

So far as can be indicated by dividends, rates are certainly not excessive. The dividends of the North German Lloyd from 1892 to 1911 averaged 3.95 per cent. 10 R. 5095, fols. 15283-5; and of the Hamburg-American Line from 1847 to 1912 6.958 per cent. 10 R. 5102, fols. 15305-6. Mr. Lister stated that the average dividend of the Cunard Line for the last ten years has been 3.30 per cent., and since Agreement AA 2.75 per cent. 13 R. 1516, fol. 4547. Mr. Ismay said that some of the older vessels of the International Mercantile Marine Company are carrying passengers at a loss. 12 R. 1026, fol. 3077.

A rate of from \$28 to \$35 for carriage and maintenance with safety and comfort over a distance of some 3,000 miles exhibits on its face a strong presumption that it is reasonable. The Panama Railroad Company and Steamship Line, owned by the Government itself, charges a \$30 steorage rate from New York to Cristobal and Colon, a distance of 1985 miles, which rate Vice-President Drake of that Company says at times is remunerative and at others not. 13 R. 1665-6, fols. 4995-6.

In conjunction with the maintenance of reasonable

rates, steerage accommodations and conveniences have increased immeasurably in the last twenty years. Kellermann, 13 R. 1571-7; Hannah, 13 R. 1440-1; Cauty, 12 R. 1089-90. It is unnecessary to quote this testimony at length, since this subject is referred to in more detail in the briefs submitted for other defendants.

In line with these arguments it should not be overlooked that competition between the Conference Lines themselves has not been eliminated.

Mr. Straus of the Russian American Line said, 12 R. 776, fol. 2327:

"We are competing just as much today as we ever did in our lives for every passenger we get."

Mr. Cauty of the White Star Line said that there was competition in every class of the business, and that in the working of the pool a line has to carry approximately its full percentage, and that if it fell behind in making its ships attractive and securing passengers it would suffer in its revenue and would have a difficult case to meet when the renewal of its pool percentage came up for consideration, 12 R. 1088-9, fols. 3262, 3264-5. Mr. Lister of the Cunard Line stated that the various lines are just as eager to get passengers as before Agreement AA, 13 R. 1499, fol. 4496; that the Cunard Line percentage has been increased, 13 R. 1500, fols 4499-4500, and that there is now rivalry between the lines in adding to their fleets, 13 R. 1501, fol. 4502; and Mr. Franklin testified, 13 R. 1802-3, fols.

5406-8, that competition is just as keen as it was before between Conference Lines as well as with the lines outside. The testimony is convincing, and it is common knowledge, that great improvements in safety, speed and comfort have been effected by all the lines in the last few years, and this Court can judicially notice the seemingly endless procession of magnificent steamers which the larger lines have supplied to the traffic.

#### FOURTH POINT

THE ALLEGED UNFAIR METHODS OF COMPETITION AGAINST LINES NOT PARTIES TO THE CONFERENCE AGREEMENT ARE NO PART OF THE AGREEMENT. THE RULES FOR TICKET AGENTS AND THE SYSTEM OF COMMERCIAL ALLOWANCES OF WHICH THE GOVERNMENT COMPLAINS ARE NEITHER ILLEGAL IN THEMSELVES NOR HAVE THEY BEEN APPLIED TO THE ACCOMPLISHMENT OF ILLEGAL PURPOSES.

The only features of the defendants' conduct in the United States of which the Government makes any serious complaint are (*a*) fighting ships; (*b*) rules for agents; and (*c*) commercial allowances.

It must first of all be observed that these matters are not mentioned in Agreement AA, and in their nature have no necessary connection with it. There is no proof that they have anything whatsoever to do with the agreement or that the doing of the acts men-

tioned would further its apparent purpose, notwithstanding their being incidents of the business of the various lines parties to the agreement, and notwithstanding also their being mentioned in certain minutes of meetings subsequent to the agreement. Properly considered, therefore, the legality of what may have been done in connection with fighting ships, rules for agents, and commercial allowances, has no bearing upon the legality of the Conference agreement itself. If any one of these features should be held illegal the agreement would still stand. The Court below took this view and merely enjoined the use of fighting ships, leaving the agreement itself in full force. In *United States v. Terminal Railroad Association*, 224 U. S. 388, 410-11 this Court held that the statute would be vindicated by the elimination of certain administrative abuses.

We shall nevertheless meet the Government's contentions on these points. The District Court having decreed against fighting ships, these defendants do not here contend that they should be permitted to compete in this manner, and we shall only refer to the matter of fighting ships for the purpose of showing that the competition of outside lines was not destroyed as contended for by the Government.

A. THE COMPETITION OF THE RUSSIAN VOLUNTEER FLEET, THE RUSSIAN EAST ASIATIC STEAMSHIP COMPANY AND THE NEW YORK & CONTINENTAL LINE (CONTINUED AS NORTHWEST TRANSPORT LINE AND URANIUM LINE) WAS NOT ELIMINATED BY THE USE OF FIGHTING SHIPS.

In order to meet the competition of these lines the defendant lines reduced the steerage rate on their ships sailing from New York at about the time ships of those lines sailed to about the same figure as that of those lines. The rates, which ranged at various times from \$28 down to \$21, were not, with one possible exception, undercut by the defendants, and the defendants' rates were sometimes higher. Nyland, 11 R. 459; Lederer, 12 R. 724; Ismay, 12 R. 1021; Cauty, 12 R. 1052, 1110; Lister, 13 R. 1536. Neither did the defendants endeavor to exhaust the traffic by more frequent sailings with low rates, nor did they delay their sailings to meet the sailings of the competing lines named. Passengers have at all times been free to sail by whatever line they chose.

The competition of the Russian Volunteer Fleet, Russian-American Line and the New York & Continental Line had to be met, and the defendant lines had the right to reduce their rates to meet it. Indeed, it is just such competition that the Government is crying for here. Had the lower rates of those lines not been met, the traffic of the defendant lines would have been demoralized for days. Straus, 12 R. 774.

Such a reduction of rates to meet competition evinces no purpose to eliminate competition. Had that been desired it could undoubtedly have been accomplished by any one of the large lines without the coöperation of any other line. Cauty, 12 R. 1109, 1093, fols. 3278-9. The *bona fide* character of this competition is well stated by Mr. Cauty, 12 R. 1110:

"Mr. Guiler: Mr. Cauty, the fair share of the business you have spoken of as somewhat smaller is like the Irishman's share of the whisky—it is at the bottom? A. Oh, no. It is rather interesting when you hear sympathizers of the Uranium Company saying that the Conference ship was put on with the idea of taking all they can get. What do they think the Uranium ship is put on for? The answer is undoubtedly to get all they can. If we put out a ship at a ten dollar rate you could justly accuse us of attacking her unfairly, because we would be using the resources of the Conference Lines on what was manifestly a ridiculous rate. But we do not do that; we have never done that. The Conference has kept its rate up almost invariably at a higher level than the Uranium Company. It is the Uranium Company that has set the pace and then squealed because something has followed."

We come now to consider the Government's charges with respect to each of these lines:

#### 1. Russian Volunteer Fleet.

Mr. Richard, who represented the Russian Volunteer Fleet from July, 1906 to July, 1908, 12 R. 790, fol. 2370, did not suggest any objection to fighting ships on the part of his Line or that its traffic had

thereby been impaired, 12 R. 826-7, fols. 2478-80. He said:

"Q. The Volunteer Fleet went out with full cabin and full steerage? A. Not full steerage. *I think we got a fair share, I think we had better than any other conference line.*

"Q. And notwithstanding that you thought the conference ought to give you their agents too? A. Yes.

"Q. You thought that would be fair and reasonable? A. Yes, because it was the intention of the Volunteer Fleet to have a weekly service instead of a semi-monthly service. We wanted to get more steamers.

\* \* \* \* \*

"Q. In what respect did you regard it as unfair competition? A. In preventing conference agents from representing the Volunteer Fleet. That was my *sole objection to it.*" (Italics ours.)

That Line did not go out of business, but only out of the Trans-Atlantic business. Winter, 13 R. 1760, fol. 5280. There may have been many reasons for its discontinuance, and for anything that appears it may have withdrawn because it found more profitable trade elsewhere. In a letter dated January 25, 1911, 12 R. 820, Admiral Radloff, then President of the Russian Volunteer Fleet, stated that

"The Committee of the Russian Volunteer Fleet had decided to suspend their Libau-New York line for reasons of their own that had nothing in common with the attitude taken by the Pool."

The Government states (Brief, page 30) that the vessels of the Volunteer Fleet were "especially fitted



for the North Atlantic steerage traffic." But Mr. Fourman testified on direct-examination, 11 R. 551, fol. 1653, that these vessels were built originally for the Far Eastern traffic between the Black Sea and Vladivostock. Mr. Richard said they were expensive vessels to run and that one of them, the old *Prince Bismarck* of the Hamburg Line, was not especially fitted or equipped for a mechanical running in the North Atlantic under modern conditions, 12 R. 818, fol. 2453. Mr. Gips said that they were good, "at least the speed." 11 R. 485, fol. 1455.

The Government also contends (Brief, page 30) that Conference Line agents made misrepresentations as to the service of the Volunteer Fleet. The only proof cited is a letter written by C. B. Richard & Co. to the effect that an agent had written them saying that two well known Conference agents had approached a reverend gentleman of responsibility after he had bought a ticket by the Russian Volunteer Line and told him that that Line was not fit to send his dog by, had poor steamers and served unfit food. 11 R. 208, fol. 624. This proof is of equal weight with Mr. Richard's complaints against agents' remarks that the steamers were unseaworthy and had been shot full of cannon balls during the Russo-Japanese war and would be liable to sink at any time. 12 R. 797, fol. 2390. When asked if any further remarks were made Mr. Richard said "It is so long ago I don't recollect." 12 R. 797, fol. 2391. The Government cannot seriously contend that this silly talk of ticket agents is

evidence of a purpose on the part of the Conference Lines to destroy the business of the Russian Volunteer Fleet.

2. Russian East Asiatic Steamship Company or Russian American Line.

The contention with respect to this Line is not that it was forced out of business, but that it was forced into the Conference, and this by the identical methods which it is claimed drove the Russian Volunteer Fleet out of the North Atlantic trade! When upon the admission of the Russian American Line to the Conference its percental share of the traffic east-bound was fixed at  $2\frac{1}{2}$  and 3 per cent., 5 R. 2683-4, the Conference Lines were very far from showing a purpose to secure all the traffic for themselves.

Mr. Straus testified that the reason this Line sought admission to the Conference was to have the benefit of the reliable agents of the Conference, 12 R. 765-6, fols. 2295-6, and that it felt confident that it could win its way into the Conference. 12 R. 749, fol. 2245. He suggested no objection on its part to fighting ships.

3. New York & Continental Line, Northwest Transport Line and Uranium Line.

These three lines, which in reality represent only one continuous line, are alleged to have been oppressed and put to serious losses by the same methods which the Government alleges were used against the Russian Volunteer Fleet and the Russian American Line. The

evidence as to this, however, is entirely vague and indefinite and is expressly contradicted. Mr. Fourman could not remember whether rates were reduced against the New York & Continental Line, 11 R. 561, fol. 1682, and Mr. Thomas testified, 13 R. 1703, fol. 5107:

"So far as the New York-Continental is concerned the only opposition we had was the new Hamburg Line, which belongs to the Hamburg-American Line."

This new Hamburg Line, according to the best information Mr. Thomas could give, was operated by the Hamburg American Line, 12 R. 645, fol. 1935.

As to the Northwest Transport Line the evidence is, if possible, even more flimsy. There is no evidence that that Line lost money, or that if it did such loss was in any way due to the Conference Lines. The fact that C. B. Richard & Co. retained the money for prepaid tickets in order to have money to refund to purchasers in case the Line went out of business, Straus, 12 R. 766, fol. 2298, indicates that they regarded it as somewhat irresponsible financially.

With regard to the Uranium Line the evidence is of the same nature. Mr. Thomas said he knew nothing about the financial end of the Uranium Line, except that he could tell when a ship makes money. 13 R. 1713, fol. 5137. At page 1709, fol. 5125, he said he believed the Line was making money, and at page 1698, fol. 5093, he said that for quite a while now the Line has been profitable.

The lowest rate at which the Uranium Line and

the others mentioned did business in competing with the Conference Lines, \$21, is the rate at which the Government strenuously contended below that steorage traffic could be profitably carried by all the Lines. If higher rates are excessive why should it be contended that the Uranium Line thus suffered severe losses?

Conceding, as it must, that the Uranium Line has not been driven out of business, the Government suggests (Brief, page 33) that it is only saved from insolvency by the fact that certain of its wealthy stockholders guarantee its obligations. The testimony of Mr. Richard, 12 R. 822; Mr. Cauty, 12 R. 1094; Mr. Thomas, 13 R. 1693-1701, and Mr. Smith, 13 R. 1721-7, sufficiently proves that it is a railroad-owned or controlled line and but a mask for the Canadian Northern Railway Company. The financial responsibility of the Uranium Line is somewhat indicated by the fact that Mr. Thomas "may have thought it was a good thing" to have his contract with the Line guaranteed by Mr. Hannah, 13 R. 1696, fol. 5087, who is the third Vice-President of the Canadian Northern Railway Company, 13 R. 1693, fol. 5079.

If figures would have supported the Government's charge that these various lines were robbed of their just share of traffic by fighting ships, it may be assumed that it would have called attention to such figures, as they could readily have been compiled from the Trans-Atlantic Passenger Movement Tables for the years 1906 to 1911, which the Government put in

evidence, 2 R. 593-1041, and from the table for 1912, put in evidence by the defendants, 10 R. 5096. A careful analysis of these tables by the solicitors for the North German Lloyd, at page 28 of their brief, shows conclusively that throughout the period of competition of which the Government complains, the ships of the outside lines secured on an average, trip by trip, well up to the number of steerage passengers carried by any of the Conference Lines, and in many instances even a higher average than the Conference Lines. Government Exhibit 159 (Brief, page 34) is worthless for lack of analysis and comparison with other lines.

According to Mr. Cauty's statement of eastbound steerage traffic, 12 R. 1095, fol. 3285,

"In 1908 the non-pool Lines carried 9.09 per cent. of the business; in 1909, 6.46; in 1910, 11.13; in 1911, 12.77; in 1912, up to July 31, they carried 9.84. The carryings probably of the eastbound business are, of course, much stronger in the second half of the year."

The Holland-America Line statement of eastbound steerage passengers secured by the New York & Continental Line from April to August, 1908, 7 R. 3804, fol. 11410, shows:

" <i>Volturno</i> from New York	April 12th.....	472
" <i>Avoca</i> from New York	May 5th.....	745
" <i>Jelunga</i> from New York	May 10th.....	721
" <i>Volturno</i> from New York	June 6th.....	321
" <i>Jelunga</i> from New York	June 20th.....	259
" <i>Jelunga</i> from New York	July 28th.....	300
" <i>Volturno</i> from New York	Aug. 22nd.....	302

From these facts it is a fair and reasonable conclusion that these three outside lines were not driven out of business by the so-called fighting ships. It is undoubtedly true that the outside lines made less profit than if there had been no such competition; but that is an incident of all competition, and such a detriment to a line, so long as it is not ruinous, is not a detriment to the public, but rather a boon.

#### B. Rules for Agents.

The petition alleges that pursuant to and in furtherance of the alleged conspiracy the defendants agreed

"that no one of them shall continue in its employ as agent for the sale of tickets over its line any person who shall act as agent for the sale of third class or steerage tickets over any independent line in competition with said defendants' lines."

and that this measure was employed as a part of the alleged illegal and oppressive attack on the Northwest Transport Line. 11 R. 32, fol. 95. The agreement alleged is in substance Rule 9 of the Agency Rules, 1 R. 219, fol. 655. As to its being put in force to oppress the Northwest Transport Line, the evidence shows that it existed many years before that line came into existence and before Agreement AA, dating back to November, 1879. Richard, 12 R. 930, fols. 2789-90. The whole body of rules of which that is a part, 1 R. 216-21, was adopted for the proper conduct of the business of the lines. The need for effective control over

ticket agents is shown by the testimony of Mr. Hannah, 13 R. 1451-4, 1489-91, and Mr. Winter, 13 R. 1731-9.

Enforcement of these rules for agents constituted Mr. Richard's sole objection to Conference Line methods. 12 R. 827, 930, fols. 2480, 2789. Perhaps his objection arose partly from the fact that the Russian Volunteer Fleet, of which he was agent, wished to establish a weekly service and thought it only fair that the Conference should give that line the benefit of its agents. 12 R. 827, fol. 2470.

As a mere means of business protection, the lines would seem to have a right to control their agents, in view of the testimony of Mr. Straus that before joining the Conference the Russian-American Line would offer Conference agents more commission than it did its own "in order to induce them to put some of their business over our line." 12 R. 760, fol. 2279. In such methods Mr. Richard admitted that he co-operated with Mr. Straus, and did all he could "to seduce the agents of the Conference," and that in some instances he succeeded. 12 R. 814, fols. 2441-2. Mr. Richard did not think it would be unreasonable for a railroad ticket office to refuse to sell the tickets of a competing railroad. 12 R. 814, fol. 2442.

The Government complains of the disqualification and fining of agents for violation of the agency rules, but has brought no agent to testify in complaint of any treatment received or to deny the justice of such disqualification or fining. Agents have not been arbitrarily disqualified and have been given the option to



remain in the service of the Conference Lines. 8 R. 4040. Nor are they disqualified except by the consent of all the lines. 8 R. 4189, fol. 12567. Appendix II to Agreement AA provides that an agent cannot be disqualified by the lines unless the line employing him proposes the disqualification. 1. R. 78, fol. 232.

The Government suggests that the purpose of Rule 9 was to prevent outside lines from securing the services of agents and to secure a monopoly of the steerage traffic through control of the agents who direct the supply. The purpose seems rather to have been to secure and retain trustworthy agents for themselves. If the argument suggested were forced to its logical conclusion the Conference Lines would be obliged to afford other lines the services of their agents, for failure to do which the securing of traffic through such agents would constitute a monopoly. A complete answer to such an argument is that the Conference Lines have not cornered, or sought to corner, the available supply of persons fit and willing to act as agents. Any agent is free to choose whether he will represent a Conference or a non-Conference Line. It is of no legal consequence that it may be more profitable to represent a Conference Line. The business success of one line and its agents has no bearing on the methods and persons by which another line and its agents can secure business.

Nobody doubts that any one and all of the defendants may themselves refuse to sell tickets for competing lines. They need not put agents in the field at all, and if they do may allow themselves to be repre-

sented on such terms as they desire. They may all choose the same person for their agent, and make it a condition of his employment that he does not at the same time represent other persons. If they were all represented by separate agents upon condition that the respective agents should not serve other persons, a practice quite usual and entirely proper, the effect upon the business of the outside lines would be no different from that complained of. Neither in law nor in morals are the Conference Lines required to allow their agents to aid their competitors. This would place agents in an inconsistent position. So long as the non-Conference Lines have an opportunity to sell tickets either directly or through agents, and the public has every opportunity to buy such tickets in preference to those of Conference Lines—and such opportunity is not questioned—there is no restriction of passenger traffic and no restraint of trade.

It is no restraint of trade to restrict the sale of goods to customers who will refrain from handling the goods of competitors. *Whitwell v. Continental Tobacco Co.*, 125 Fed. Rep. 454 (C. C. A., 8th Circ. 1903). By like reasoning there can be no objection to restricting the activities of an agent to the business of a single employer. This situation does not differ in principle from those cases where it is held that rebates in exchange for exclusive trading do not contravene the Sherman Act. See *In re Greene*, 52 Fed. Rep. 104, 117, decided by Jackson, C. J., later Mr. Justice Jackson; *In re Terrell*, 51 Fed. Rep. 213, 215; *In re Corning*,

51 Fed. Rep. 205, 211-12; *United States v. Prince Line*, 220 Fed. Rep. 230; *Lough v. Outerbridge*, 143 N. Y. 271. In *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, an elaborate scheme for regulating the price of medicines to retailers and the public was declared to be in restraint of trade, but it appears from the opinion of Mr. Justice Hughes and the dissenting opinion of Mr. Justice Holmes at page 411, that had the retail dealers been made agents in law of the plaintiff the prices could have been thus controlled. In *United Shoe Machinery Co. v. Brunet*, [1909] A. C. 330, 336, 342-3, the Privy Council upheld as not in restraint of trade leases of shoe machinery whereby the lessee became bound not to use the machinery in the manufacture of shoes the various parts of which were not made by machinery also leased from the lessor. Lord Atkinson said, page 343:

"The respondents are at liberty to hire or not to hire the appellants' machines, as they choose, irrespective altogether of the injury the refusal to deal may inflict upon others. The same privilege entitles the appellants to dispose of the products they manufacture on any terms not in themselves illegal, or not to dispose of their products at all, as they may deem best in their own interests, irrespective of the like consequences."

From these considerations we think it fairly results that the agency system of the Conference Lines does not restrain trade and has not caused injury either to the public interest or to the outside lines.

### C. Commercial Allowances.

The Government sees evil in the failure of some non-Conference Lines to secure railroad commercial allowances. For such failure there may have been various reasons on the part of the railroads themselves with which the Conference Lines are not shown to have had any connection. Some non-Conference Lines have received the allowances. Mr. Straus testified that before the Russian East Asiatic Line entered the Conference in 1908 it received allowances, in many instances more than the Conference Lines received, 12 R. 754-5, fols. 2262-3. But however the fact may be, or whatever the reasons, we do not perceive the bearing of these allowances on the charges of monopoly and conspiracy.

The petition makes no charge with respect to commercial allowances, and they are not mentioned in Agreement AA. We do not understand that it is here intended to question the act of the railroads in paying such allowances. The railroads are not parties to this suit. The subject would seem to be entitled to no consideration here. The arguments advanced against them are quite immaterial so far as showing a tendency to restrain trade is concerned. There is no showing that the movement of passengers is in any way restricted on account of such allowances.

Commercial allowances were not forced from the railroads as part of a conspiracy, but they had their origin about 1886 in the competitive struggle by the railroads for immigrant business. McCain, 12 R. 855, fol. 2565; part of the consideration being services

and financial risks assumed by the steamship companies, McCain, 12 R. 875, 877, fols. 2625, 2631. It is hardly an objection to such payments that the steamship lines have to employ agents anyway. They result in a convenience to the immigrant, in that he can buy his ticket through for cash, McCain, 12 R. 861, fol. 2581. Once arrived in this country, an immigrant may travel by any railroad for which he expresses a preference, McCain, 12 R. 856, fol. 2568. The immigrant traffic is apportioned among the railroads by the railroads themselves, and the steamship lines have nothing to do with the apportionment, McCain, 12 R. 863, fol. 2588. The agreement between the railroads pursuant to which the apportionment is made was considered by the Interstate Commerce Commission in 1904, in *In re Transportation of Immigrants from New York*, 10 I. C. C. Rep. 13, and the Commission refused to condemn it.

### FIFTH POINT

THE SHERMAN ACT DOES NOT PROHIBIT AGREEMENTS AS TO STEERAGE RATES AND DISTRIBUTION OF STEERAGE TRAFFIC IRRESPECTIVE OF THE PURPOSE AND EFFECT OF SUCH AGREEMENTS AND THE CONDITIONS AND CIRCUMSTANCES UNDER WHICH THEY ARE MADE. THE ACT DOES NOT COME INTO OPERATION UNTIL THE PUBLIC INTEREST IS ADVERSELY AFFECTED.

Up to this point we have sought to show that the purpose and effect of the conference agreement, by

reason of the conditions and circumstances surrounding its making and the peculiar geographical and physical conditions under which steorage traffic is carried on, were not unduly to restrain trade and injure the public, but were to prevent ruinous competition between the parties to it, and consequently to benefit the public.

The Government takes no account of these circumstances and conditions nor of the purpose of the agreement which they illuminate. It will have nothing but "combination and conspiracy", as to which—thus begging the whole question of law on this appeal—it contends that neither the good done in stabilizing the business nor the fact of reasonable rates charged is any defense (Brief, pages 43-4). We do not say that if there is a conspiracy to restrain trade within the terms of the Sherman Act as interpreted by this Court it can be excused by a showing that the business has thereby been stabilized and reasonable rates are charged. Our contention, based squarely on the doctrine of the *Standard Oil Case* and subsequent cases on which the Government itself lays emphasis (Brief, pages 21-2), is that the purpose to stabilize the business and thus prevent disastrous results both to the steamship lines and to the public, together with the fact that in doing this the rates have been kept reasonable and the service improved, must be considered in determining, by the light of reason, whether the agreement is in effect a conspiracy prohibited by the statute.

First, as to the alleged conspiracy to fix rates, we

challenge the Government's statement (Brief, page 80) that price-fixing agreements among competitors are "in restraint of trade and illegal". Under the language quoted from *Dr. Miles Medical Co. v. Park & Sons Co.*, it appears that with the fixing of prices there must be a purpose to destroy competition; and that decision implies that if there is any other purpose consistent with the public interest the price-fixing agreement will not be void. Under the *Standard Oil Case*, referred to on the same page, the price-fixing agreement must be an unreasonable restraint.

The authorities sustain the right of competitors to make reasonable rate-fixing agreements. As Morton, D. J., said in *United States v. Whiting* (D. C. Mass.), 212 Fed. Rep. 466, 474-5:

"That prices were affected by the alleged agreement seems by itself not enough to render the agreement unreasonable. 23 Harv. Law Rev. 541, citing many cases. The very object of agreements as to price and of most business combinations is to affect prices; if that alone invalidates them, all such agreements and most combinations are either nugatory or unlawful. The only combination permitted would be one which was of advantage to its members simply by reducing the cost of the goods sold; but this seems a shadowy and impractical distinction; it has never, so far as I am aware, been adopted by any court.

\* \* \* \* \*

"The public has no right to unrestricted competition among all the persons engaged in any given business, nor to the benefit of prices produced by such competition."

Judge Morton cited *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 657, where it was said:

"If the object of the contract had been merely to provide in good faith a uniformity of prices among the parties thereto to avoid unhealthy fluctuations in the market, or if the contract had contemplated a joint and mutual association between the parties for the common benefit in the nature of a partnership, and had simply fixed the prices at what they considered the business would bear, instead of combination between independent manufacturers and dealers for the purpose of at least destroying all competition between themselves, then there might have been nothing in such an arrangement which the courts could denounce as pernicious and forbidden by law."

Demoralization of rates has been frowned upon by this Court. *Bitterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 205, 223-4.

In *United States v. Freight Ass'n.*, 166 U. S. 290, 369, the Chief Justice in his dissenting opinion quoted approvingly from a report of the Interstate Commerce Commission as follows:

"When competition degenerates to rate wars, they are as unsettling to the business of the country as they are mischievous to the carriers, and the spirit of existing law is against them."

And at page 364 *et seq.* he excerpted from a report of the Interstate Commerce Commission statements

"indicating that agreements among carriers, competitive as well as connecting, for the purpose of securing a uniform classification and preventing of undercut-



ting of rates, underbilling, etc., existed prior to the Interstate Commerce Act, were continued thereafter, and were deemed not to be forbidden by law, but, on the contrary, were considered as instruments tending to secure its successful evolution."

See also the dissenting opinion of Mr. Justice Holmes in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 412-3; *Dolph v. Troy Laundry Machinery Co.*, 28 Fed. Rep. 553, 555-6; *Attorney General v. Adelaide S. S. Co.* [1913] A. C. 781, 809-10; *Northwestern Salt Co. v. Alkali Co.* [1914] A. C. 461, 469.

In the case last named Lord Chancellor Haldane said:

"Unquestionably the combination in question was one the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public. Such a state of things, may, if it is not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade is an evil from a public point of view. The same thing is true of a supposed monopoly."

In a learned article on "Criminal Conspiracies in Restraint of Trade," 23 Harvard Law Review, at page 541, it is said with respect to the civil validity of contracts fixing the prices of commodities, dividing up

territory for the sale of commodities among competitors, and the like (with the citation of many cases) :

"The Courts will enforce such contracts if they are reasonable even though trade is restrained, prices are fixed, and competition is reduced."

Second, as to the alleged conspiracy to pool steerage traffic, which the Government regards as subordinate to rate fixing (Brief, page 18), exactly the same considerations as mentioned in the above cited authorities apply. None of the cases cited by the Government (Brief, pages 82-3) presented similar circumstances or a similar form of agreement to those presented by this case. The only authority on which the Government lays emphasis is *United States v. United States Steel Corporation* (223 Fed. Rep. 55). But the language of that case as to pools on its facts is not inconsistent with the authorities we have cited.

It should be noted that the Conference agreement, although frequently called a pool agreement, is not in reality a pool at all in the sense that the term has been known in this country. See *In re Pooling Freights*, 115 Fed. Rep. 588. It does not pool either earnings or traffic. None of the parties give up any traffic to any other parties, but the percentages were fixed at what each of the parties could reasonably expect to secure under ordinary circumstances entirely apart from the agreement. As we have shown (*supra*, pages 11-12) not all the parties are natural competitors for the same traffic and the agreement was in effect an undertaking

that the parties would not seek unduly to deprive each other of the traffic to which they were already naturally entitled, and was not at all a voluntary giving up of traffic in consideration of compensation. The provision for compensation to lines undercarrying their percentages did not contemplate a gift to drones, in order that the more active and powerful lines should gather all the traffic to themselves, and the record shows that undercarrying lines were urged to take steps to increase their steerage traffic when they had fallen below their percentages, and that this was done by the lowering of rates. 7 R. 3341, fol. 10022; 8 R. 4106, fol. 12317. The Government can point to no instance where any line a party to this agreement lessened its activity to secure passengers or withdraw any of its ships from service. Compensation was to be paid only after a line, in spite of its best activity, could not secure its percentage, and not as a reward for remaining idle.

The test of whether the Conference agreement is illegal is whether the public interest is thereby adversely affected. As the Chief Justice said in the *Standard Oil Case*, 221 U. S. 1, 78:

"In applying remedies for this purpose, however, the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest."

This doctrine was reiterated in the *American Tobacco Case*, 221 U. S. 106, 179; and in *Dr. Miles Medical Company v. Park & Sons Co.*, 220 U. S. 373, 406,

Mr. Justice Hughes quoted from *Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409:

“‘Public welfare is first considered, and if it be not involved, and the restraint upon one party is not greater than protection to the other party requires, the contract may be sustained. The question is, whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is, or is not, unreasonable.’”

In *United States v. Terminal Railroad Association*, 224 U. S. 383, 395, Mr. Justice Lurton said that whether the unification of the terminal facilities of St. Louis was a facility in aid of interstate commerce or an unreasonable restraint

“will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted.”

At page 405 Mr. Justice Lurton continued:

“It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact.”

This doctrine has an important bearing on this case in view of the conditions and circumstances under

which we have shown that the Conference agreement was made and the Trans-Atlantic steerage traffic is carried on.

Another decision of this Court, even more specific to the effect that all the circumstances must be taken into consideration, is *Texas & Pac. Railway v. Interstate Com. Com.*, 162 U. S. 197. There the Railway Company was charged with a violation of the Interstate Commerce Act for unjust discrimination in having accepted as its *pro rata* share of through freight rates from foreign ports an amount less than the local rate between inland points. The Railway Company alleged that in order to secure foreign traffic it was necessary to give through rates from the places of shipment to the places of final destination, and that in fixing these rates it was controlled by an ocean competition (page 216). The Interstate Commerce Commission directed that the Railway Company desist from distinguishing in its charges between foreign and inland traffic, justifying its decision on the ground that it was forbidden to consider the "circumstances and conditions" attendant upon foreign traffic. Mr. Justice Shiras for this Court said, page 218:

"We read the [Interstate Commerce] act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried; and that the attention of the Commission is not to be

confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the Commission is shut up by the terms of this act to solely regard the complaints of one class of the community."

And at page 219 his language exactly fits the case at bar:

"The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation or locality must not be *undue* or *unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act."

The force of the Chief Justice's language in the *Standard Oil Case*, that injury to the public "is the foundation upon which the prohibitions of the statute rest", is strikingly illustrated by the case of *United States v. Whiting, supra*, where Judge Morton thus defined unreasonable restraint (212 Fed. Rep. at page 475):

"In order to make a restraint unreasonable, it must, it seems to me, appear either (1) that the normal volume of interstate trade has been interfered with by artificial agencies affecting to a substantial degree, *to the disadvantage of the public* the prices or supply of the product, commodity or business which is the subject of the alleged restraint, and going beyond what

is fairly required for the proper protection of the parties accused; or (2) that by means of a combination or agreement between the parties concerned, either by themselves alone or in connection with others, the price or supply of the product, commodity, or business which is alleged to be the subject of undue restraint, is or may be affected to a substantial extent to the disadvantage of producers or purchasers, *so as thereby to operate in a material degree to the injury of the public*, and beyond what can fairly be said to constitute a proper protection for the parties to the alleged combination or agreement; or (3) that there has been direct and intentional interference with the transportation of commodities between the states." (Italics ours.)

That case was an indictment under the Sherman Act on account of an agreement to destroy competition and keep up prices. Although by reason of the positive allegations of the indictment it was sustained on demurrer, Judge Morton emphasized the fact that the price agreement in order to be objectionable must work injury to the public. No person can be held guilty for taking what are merely reasonable steps to protect his business so long as he does not at the same time injure the public. What amounts to a public injury does not, of course, differ as the particular case in which the question arises may be civil or criminal.

We have already shown that the public interest is not injuriously affected by the Conference agreement or by the methods by which the defendant lines are now conducting their business. They do not seek to drive any existing outside lines from the steerage

trade, and there is no evidence that new interests are prevented from entering the trade by the attitude of the defendants. The fourth head of the Government's argument (Brief, pages 91-106) is without merit. Each case must stand on its own facts. None of the cases cited by the Government show any controlling similarity with the case at bar. Generally speaking, they were all cases where there was either a consolidation of previously competing interests, or an attempt to drive competitors out of business, the necessary effect of which under the circumstances there shown was the complete elimination of competition to the injury of the public.

## SIXTH POINT

CONGRESS DID NOT INTEND BY THE SHERMAN ACT TO REGULATE PASSENGER TRAFFIC WITH FOREIGN NATIONS OR TO CONDEMN TRAFFIC AGREEMENTS BETWEEN OCEAN CARRIERS.

The Government argues at considerable length that Congress has power, and that in enacting the Sherman Act it intended, to make foreign passenger traffic subject to its terms. We do not dispute either the power or intent of Congress to regulate any acts with respect to foreign commerce which take place within the boundaries of the United States. Neither do we dispute the power of Congress to regulate, within the limits recognized by comity and by international law, foreign



commerce beyond our boundaries. What we do contend is that Congress did not by enacting the Sherman Act intend to declare the power which the Government now seeks to exercise. This question is discussed fully in the briefs submitted by other counsel, and we shall therefore state our contentions very briefly.

In the first place, the Sherman Act is a penal statute and must be presumed to have no extra-territorial effect. It provides that it shall be a misdemeanor punishable by fine and imprisonment to combine in restraint of commerce with foreign nations. Although this proceeding is equitable in form, it is for the enforcement of a penal statute, and an injunction is not authorized unless the defendants have committed the offense which has been created a misdemeanor. When the statute was enacted there was a subject matter to which the words "foreign commerce" referred without applying it to transportation beyond our shores. In *Coe v. Erroll*, 116 U. S. 517, it was held that goods are in foreign commerce as soon as their transportation from an inland place to their foreign destination begins. Obviously such foreign commerce while moving in a state might become the subject of a combination between carriers within the State to restrain or monopolize it. The application of the Sherman law to such a combination presents no difficulties. Unless the express words of the statute unmistakably apply to transportation beyond our shores they should therefore be confined to such foreign commerce as is conducted within our borders.

In the second place, the history of the times when the Sherman Act was passed shows that the country was suffering from dangers arising from unrestrained combination of capital in industrial business within the country. Neither in Congress nor out of Congress does there appear to have been any suggestion that combinations of ocean carriers were an evil which threatened our prosperity. See *Holy Trinity Church v. United States*, 143 U. S. 457, 472. This silence, however, could not have been due to any ignorance of the fact that combinations and agreements between ocean carriers had long been recognized by the great ship-owning countries as a necessary and proper method of conducting the business. The famous case of *Mogul Steamship Co. v. McGregor* had been decided by the English Court of Appeal in 1889 (23 Q. B. D. 598, aff'd. [1892] A. C. 25). It was well known that foreign ship owners united in combinations. Notwithstanding this, no reference whatever was made to these combinations and to this method of conducting ocean transportation. The reason is obvious. The United States was then and for a long time prior to the passage of the Sherman Act had been compelled, as it is now, to rely almost wholly upon foreigners to conduct its ocean transportation. Those foreign ship-owners and their ships were, of course, governed by the laws of their own countries.

Effective regulation of commerce depends upon power to regulate at both ends. Over interstate com-

merce the Federal Government has this power, but over passenger traffic, originating in Germany, France, Holland or Great Britain, it has no power, unless and until the same reaches our ports. Westbound traffic is subject to the regulating power of the Governments named, and it is inconceivable that in the absence of international agreement the business organization under which an ocean carrier may engage in business should be subject to the control at the same time of both Great Britain or Germany, for instance, and the United States. See the *Passenger Cases*, 7 How. 392, 399; *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204; *U. S. v. Knight*, 3 Int. Com. Rep. 801. The regulating power of Congress would necessarily in any event be confined to eastbound traffic originating at United States ports.

The Government suggests that this country could prohibit foreign steamship lines from carrying on commerce with the United States unless they complied with any conditions prescribed by the United States. This is true only to the extent that the conditions imposed were rational and reasonable, and, as Secretary of State Bayard said in the case of *Cutting*, 2 Moore's International Law Digest, 242, with respect to the entry of foreigners into a country:

"No condition can be regarded as rational, or as consistent with those amicable relations which nations should seek to cultivate and foster, that derogates from the sovereignty and exclusive jurisdiction of foreign states over their own territory."

It is, of course, not to be presumed that Congress intended to impose unreasonable conditions in the absence of express words.

In the third place, subsequent anti-trust provisions show that in passing the Sherman Act Congress never had in mind the regulation of steerage traffic. By sections 73 and 76 of the Wilson Tariff Act of 1894, 28 Stat. L. 570, continued in force by section 34 of the Dingley Tariff Act of 1897, 30 Stat. L. 213, trusts and combinations in the importation of foreign goods were forbidden and declared illegal, thus indicating that Congress did not then conceive that in enacting the Sherman Act it had covered even the importation of foreign *goods*. Obviously if it did not forbid combinations with respect to goods, it did not intend to regulate the means by which such goods were brought to this country. Not even when its attention was directed to the evils which might result from combinations with respect to goods did Congress take any action to prohibit or restrain any possible evil with respect to the ships by which goods should be brought. If the general language of the Sherman Act had covered the importation of goods it would also necessarily have covered carriage of passengers.

Further than this, the seizure clauses of the Sherman Act and of the Wilson Tariff Act show that Congress recognized its lack of power over ocean transportation between the United States and foreign countries. Section 6 of the Sherman Act (26 Stat. L. 210) confines itself to property intended for export. Section

76 of the Wilson Act relates only to property imported. The Sherman Act permits the seizure of certain property when in the course of transportation *to* a foreign country. The Wilson Act does not permit the seizure of such property while in course of transportation from a foreign country to the United States, but only while in the course of interstate transportation.

By this significant omission Congress recognized that by the Sherman Act it had jurisdiction over unlawful property while it was in course of transportation to a foreign country so long as that transportation took place within the United States. It did not however in express terms, in this seizure section of the act, limit the power of seizure to that period of time when the goods were in course of transportation within the territorial jurisdiction. As in the earlier portions of the act referring to commerce with foreign nations, it used broad language. In each case the language, literally interpreted, is broad enough to make the act apply to foreign commerce and transportation of passengers to a foreign country, whether within or without the territorial jurisdiction of the United States, but it is equally clear that in each instance Congress recognized the limitations of its powers and intended the words used to have a limitation consistent with the power which it possessed.

The consequences of a contention that the seizure section of the Sherman Act was intended to confer power upon the Government to seize property without the territorial jurisdiction of the United States make it

impossible to impute such a purpose to Congress. Cargoes "in the course of transportation \* \* \* to a foreign country" by foreign vessels are under the exclusive jurisdiction of the country of the vessels from the time they leave our shores. See *Rose v. Himeley*, 4 Cranch, 241.

The omission from the seizure clauses of the Wilson Tariff Act of any provision for seizure while unlawful goods are in course of transportation from a foreign country is the clearest proof that Congress then, as when the Sherman Act was passed, recognized the limitations of its powers and refrained from any legislation which would attempt to extend the jurisdiction of the United States beyond our own shores.

If Congress has by the Sherman Act exercised a power to regulate steerage traffic in any respect before it has reached or after it has left our shores, that power extends to whatever may be done in the course of any voyage which may have been undertaken as part of a purpose opposed to the Act, as well as to whatever is done in England, Germany and other foreign countries in administering the Conference agreement, settling accounts, publishing agreed rates and many other matters. The very statement of this proposition is enough to condemn it. See *American Banana Co. v. United Fruit Co.*, 213 U. S. 347. The proper limitation is stated by Mr. Justice McKenna in *United States v. Pacific & Arctic Co.*, 228 U. S. 87, 106:

"If we may not control foreign citizens or corporations operating in foreign territory, we certainly may

control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations."

We respectfully submit, therefore, that the Sherman Act carries no authority to prohibit the execution of any other features of the Conference system complained of than those actually carried out in this country, as to which, however, as well as all other features of the Conference system, we submit the Government has not established any well founded objection, even under the broadest possible construction and application of the Act.

### LAST POINT

THE DECREE DISMISSING THE PETITION SHOULD BE AFFIRMED.

New York, November 1, 1915.

BURLINGHAM, MONTGOMERY & BEECHER,

Solicitors for American Line, Anchor Line,  
Dominion Line, Holland-America Line,  
Red Star Line, White Star Line, and De-  
fendants Coverly, Franklin and Gips, Ap-  
pellees.

CHARLES C. BURLINGHAM,  
ROSCOE H. HUPPER,  
Of Counsel.





THE UNITED STATES OF AMERICA

DEPARTMENT OF THE INTERIOR

BUREAU OF LANDS

OFFICE OF THE ASSISTANT ATTORNEY GENERAL  
WASHINGTON, D. C.

NOTICE

WHEREAS the United States of America  
has acquired certain lands in the State of California

THE UNITED STATES OF AMERICA

has acquired certain lands in the State of California  
and the same are now being offered for sale

THE UNITED STATES OF AMERICA  
BUREAU OF LANDS

WASHINGTON, D. C.  
MAY 1911

THE UNITED STATES OF AMERICA

IN THE  
Supreme Court of the United  
States

OCTOBER TERM, 1915.

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No. 289.

THE UNITED STATES OF AMERICA, APPELLANT,

v.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT ET AL.

No. 332.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT ET AL., APPELLANTS,

v.

THE UNITED STATES OF AMERICA.

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*Appeals from the District Court of the United States  
for the Southern District of New York.*

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**BRIEF FOR THE RUSSIAN EAST  
ASIATIC STEAMSHIP COMPANY,  
LTD., ALEXANDER E. JOHNSON  
AND MAX STRAUS.**

It is not the purpose of this brief to enter into a discussion of the principles of the law involved in view of

the fact that these defendants contend that they were not members of the alleged conspiracy to violate the law at the time of the institution of this suit.

These defendants contend that the District Court did not, on final hearing, "reverse itself" (brief of United States, p. 2), but held, in view of all the facts, that the alleged combination was not a violation of the Anti-Trust Law.

Even with the large record in this case there are only three methods pointed out by the United States as methods of unfair competition (brief of United States, p. 22), with an additional charge not however pressed that the rates were excessive (brief of United States, pp. 116, 117).

It is submitted that a careful examination of the record will establish that the operation of the alleged pool was to the benefit, not only of the immigrants, to which it is charged that it primarily related, but to the traveling public in general and to the economic conditions of these United States of America. If, in place and stead of the term "light of reason" its equivalent "detriment to the public" is applied to the record, there is no evidence of a single act detrimental to the public. At most, the alleged conference was a voluntary association of various steamship lines formed for the purpose of exchanging views, preparing statistics, and preventing abuses in the treatment of immigrants. The United States has pointed out with great vigor, in its brief, that the Uranium Line was attempted to be driven out of business. That line never applied for admission to the so-called conference (2 R. 3576).

The attitude of the officials of the United States with respect to the conference have considerable bearing as to whether the action was reasonable or not.

The evidence shows that for many years the United States of America was familiar with the operation of

the American Conference; and the tabulations prepared by the Secretary of the American Conference were furnished it (1 R. 903); the Department of Commerce and Labor communicated its wishes and desires for carrying out certain regulations to all the lines through the office of the Secretary; as did likewise the Department of the Treasury (3 R. 4243, 4247). The American Conference operated at Ellis Island, on territory leased by the United States (2 R. 2568-2575 inclusive).

The United States in operating the Steamship Line of the Panama Railroad Company attended the meetings of a similar conference known as the Caribbean Conference (3 R. 5001).

The methods alleged to have been adopted were not wrongful and did not have the results claimed by the United States.

The brief of the United States alleges that the Russian Volunteer Fleet was driven out of business due to the unfair method of competition. There is no satisfactory evidence to that effect. The vessels of that line were expensive vessels to run and not especially fitted or equipped for economical running in the north Atlantic (2 R. 2453), and the president of that company assigned the real reason for the withdrawal (Defendant's Exhibit 3, 2 R. p. 820).

The New York & Continental Line, or its successor, the Northwest Transport Line, or the Uranium Line, were never in a financial condition to operate successfully. Their own agents were even afraid to turn over the passage money prior to the embarkation of the passengers (1 R. 1859, 1861; 2 R. 2297, 2298, 2801). The agent of the Uranium Line was not satisfied with an agreement for his own employ (3 R. 5086). At the same time he was willing to accept passage money for the transportation of poor immi-

grants at a time when the company's liabilities exceeded its assets (3 R. 5100). These successive lines deliberately mis-stated facts to the public, which is conclusively shown to be one of the things which the members of the alleged conference were forbidden to do.

Rule 9, which is alleged to be one of the unfair methods adopted by the Conference, provides, in substance, for the control of the persons appointed by the various steamship lines to sell the tickets of the respective lines, and provides that no person selling tickets for outside lines shall sell the tickets of the lines. It is virtually a provision that the employer can choose its own employee. Rule 9 was optional with the lines (3 R. 416). It was adopted at a time when the abuses referred to in the testimony were flagrant, such as the selling of tickets under false representations as to the lines or as to the route by which passengers were to be transported (1 R. 925). It disqualified Zotti (1 R. 988), and Zotti subsequently absconded with a large amount of money belonging to immigrants. It operated to prevent runners, prevalent before the enactment of the rule (2 R. 2282, 2283). It was a voluntary act of the various steamship lines to secure responsibility among the agents, which some of the states have been endeavoring to secure by legislation, and which is provided for in Italy by a state license (2 R. 2811; 2 R. 4352, 4467, 4468). In some of the states there are provisions which make the operation of the rule unnecessary (3 R. 5269), but not in all.

The agent was free to choose whether he would represent the outside line. The so-called outside line was at liberty to, and at times did secure agents who were trained by his competitor (2 R. 2441, 2442).

In view of the charge that the existing rates are excessive, the following pertinent facts are submitted:

As to some of the members of the alleged Conference it is pointed out that the rates charged by them were investigated by a foreign government and found satisfactory (2 R. 2809). While the finding of a foreign government is not conclusive upon this court, it is evidence of a high character that the rates were not unreasonable. In fact, the evidence establishes that the rates have not been increased proportionately to the increased cost in wages, coal, wharfage, wireless and with the added facilities and improvements (3 R. 4341, 4521, 4871). The United States' own witness has testified that the rates were reasonable (2 R. 2439, 2444), and that the rates prior to the establishment of the so-called Conference were higher (2 R. 2794).

Moreover, the United States' own officer admits that the rates were not unreasonable (3 R. 4984 *et seq.*). The average rate charged by members of the Conference was about \$31 per carriage of a minimum distance of 3,000 miles, or a small fraction over a cent a mile; the minimum rate charged by the Government for service of similar character for a distance of 1,985 miles is \$30 (3 R. 4995, 4996), or more than 33 1/3% higher than the rates collected by the alleged members of the so-called pool.

In determining what a reasonable rate is, it is submitted that the traffic is seasonable (2 R. 2216, 2290); that the economic loss of supply and demand have considerable effect (2 R. 2807, 2809; 3 R. 5036, 5128); that the earnings of the respective lines not only depend upon the number of passengers carried but upon the movement of freight, which, in turn, depends not upon domestic conditions but upon world-wide conditions; that the cost of operation has increased (3 R. 4442, 4945, 5070). In this connection the present conflict in Europe shows that without any notice the expensive plants necessary to operate are rendered useless, so to speak, over night.

It is charged in the brief of the United States that the profits of the lines were undue. Again the testimony of the Government's own officer must be considered, to wit, that it is necessary for a steamship line to earn from twelve to twenty per cent to make it equivalent to a six per cent dividend by a railroad (3 R. 4988). The brief for the first time raises the question that the rates were unreasonable. The United States has introduced no evidence as to "the value of the property that is employed in the public service" (*Kansas City Southern R. R. Co. v. The United States*, 231 U. S., 433).

The commercial allowance criticised by United States (brief, p. 28) had no relation whatsoever to the so-called Conference (1 R. 1586). The defendant, the Russian East Asiatic Steamship Co., Ltd., received the allowance at all times whether in or out of the Conference (2 R. 2262, 2263, 2354). The Uranium Line secured the commercial allowance (1 R. 1759, 1868).

It is respectfully submitted that bill of complaint should be dismissed.

RALPH JAMES M. BULLOWA,  
Solicitors for Defendants, Russian East Asiatic Steamship Co., Ltd., Alexander E. Johnson and Max Straus.

THE UNITED STATES OF AMERICA

HAMBURG-AMERIKANISCHES PACKETFAHRT-ACTIEN-  
GESELLSCHAFT & CO.

NO. 222

HAMBURG-AMERIKANISCHES PACKETFAHRT-ACTIEN-  
GESELLSCHAFT & CO., APPEALS

THE UNITED STATES OF AMERICA

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR NORTH GERMAN LLOYD, AND  
OELRICHS & CO., GENERAL AGENTS.

WILLIAM G. CHOATE,  
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*Solicitors for North German  
Lloyd.*



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In the Supreme Court of the United States,

OCTOBER TERM, 1915.

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No. 289.

THE UNITED STATES OF AMERICA, Appellant,

v.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT *et al.*

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No. 332.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT *et al.*, Appellants,

v.

THE UNITED STATES OF AMERICA.

---

APPEALS FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

BRIEF FOR NORTH GERMAN LLOYD, AND  
OELRICHS & CO., GENERAL AGENTS.

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**Statement.**

**Cross-Appeal.**

The United States District Court, in overruling the demurrers to the petition, held that the Sherman Anti-trust Act applied to ocean transportation between this

country and foreign countries (200 F. R. 806), and on final hearing the Court followed this ruling as the law of the case.

Demurrers, vol. 10, pp. 5103-22.

Opinion Overruling Demurrers, *Id.*, pp. 5123-6.

Order Overruling Demurrers, vol. 14, pp. 12-14.

Final Decree, Main Record, vol. 10, pp. 5136-8.

Opinion of Final Hearing, *Id.*, pp. 5127-33.

Assignment of Error, vol. 14, p. 4.

The cross-appeal is taken from the final decree insofar as it involves the above ruling.

**POINTS.****I.****Cross-Appeal.**

**The District Court erred in not dismissing the petition on the ground that the ocean transportation carried on by the defendant steamship lines, mainly of foreign countries, is commerce of an international character, in which other countries are as vitally interested as our own, and which it is not to be presumed Congress would assume to regulate in view of our international policy of comity and co-operation as shown in our foreign relations, without international agreement and consent, and is therefore not within the purview of the Sherman Anti-Trust Act (Assignment of Error, vol. 14, fol. 12).**

Commerce with foreign nations is regulated not only by acts of Congress passed pursuant to the commerce clause of the Constitution, but also, and to much greater extent, by international treaties, conventions and agreements entered into by the President and Senate pursuant to their control of our foreign relations and the treaty-making power.

Regulation by international convention or agreement with the different powers is the method commonly adopted by our Government in recent years, and shows the strong and constantly increasing tendency of the different governments of the world to recognize

each others' rights and co-operate in matters of mutual interest and concern, and thereby bring about harmonious action, which could <sup>not</sup> be attained by individual and conflicting legislation.

Instances of these international conventions with other powers are as follows:

Revised International Regulations for Preventing Collisions at Sea, adopted by Act of March 3, 1885 (23 Stat. 483).

Act of July 9, 1888, providing for an international conference to secure greater safety for life and property at sea and to formulate and submit for ratification to the Governments of all the maritime nations proper international regulations for the prevention of collisions and other avoidable marine disasters (25 Stat. 243); and Regulations adopted by Act of August 19, 1890 (26 Stat. 320).

International Sanitary Convention, to prevent the spread of plague and cholera by vessels. Paris, December 3, 1903 (35 Stat. 1834); and Arrangement for Establishment of the International Office of Public Health pursuant to Art. 181 of said Convention (35 Stat. 2061).

International Convention for the Unification of Certain Rules with respect to Assistance and Salvage at Sea. Brussels, September 23, 1910 (37 Stat.).

International Wireless Telegraph Convention, relating to ships, Berlin, November 3, 1906 (37 Stat.); and International Radiotelegraphic Convention, London, July 5, 1912 (38 Stat.).

International Marine Conference to consider uniform laws and regulations for the greater security of life and property on merchant vessels at sea (Joint Resolution of June 28, 1912, 37 Stat. 637-8).

There are also many other international conferences and conventions referred to in the statutes on other subjects, showing the mutual co-operation of the different countries in matters of common interest, as for example, the convention creating the International Institute of Agriculture at Rome, referred to below.

**Proposal of Our Government to Establish an International Commerce Commission on Ocean Freight Rates.**

Recently this Government has proposed to the International Institute of Agriculture, at Rome, Italy, of which it and 54 other nations are adhering members, that the Institute invite the adhering governments to participate in an international conference to be held at Rome in 1917 on the subject of steadying the world's price of staples, which is to consider the advisability of formulating a convention for the establishment of a permanent **International Commerce Commission on Merchant Marine and on Ocean Freight Rates**, with consultative, deliberative, and advisory powers (Joint Resolution of Congress, approved Sept. 19, 1914, 38 Stat. 779, and summary of International Convention creating the Institute, printed in Appendix to this Brief).

On February 27, 1915, at a meeting of the Permanent Committee of the Institute, composed of dele-

gates from Great Britain, France, Russia, Germany, Austria, and other countries, the joint resolution of Congress was submitted to that body by our delegate and a motion made by him to have the matter made part of the program of the next General Assembly of the Institute, in accordance with the instructions contained in the resolution of our Government.

The proposal of the United States was received with great favor by all the delegates and the motion unanimously carried (see Minutes of Proceedings printed in Appendix of Brief).

The joint resolution of Congress was the culmination, with respect to the great part of ocean freight traffic, of the first investigation either branch of Congress had made into the subject of ocean transportation.

This investigation covered the whole field of ocean transportation as affecting the interests of this country, and was made, pursuant to special resolutions of the House of Representatives, by its Committee on Merchant Marine and Fisheries, of which Mr. J. W. Alexander of Missouri was Chairman. It was begun in the Fall of 1912, some time after the present suit was commenced, and was concluded in the Spring of 1914, before the final argument of this case in the court below.

The report of the Committee recognizes the great advantages of the system of steamship conferences and agreements, which has grown up in the ocean trade and is in use generally throughout the world, and recommends its maintenance rather than its destruction, as

being in the interest of the shippers of this country (see Recommendations of the Committee in Appendix).

The report says:

"Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of co-operative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

Believing, however, that there should be some governmental supervision of the matter, the Committee recommends that the whole subject be placed under the supervision of the Interstate Commerce Commission, which it proposes to enlarge for that purpose, and that the agreements when approved by the Commission be excepted from the provisions of the Sherman Anti-Trust, which had previously been held by the court below to cover the subject of ocean transportation.

This is the general effect of the proposed bill to carry out the recommendations of the Committee, which was introduced in the House by Chairman Alexander on June 18, 1914, and referred to his committee (House Bill No. 17,328).

Before any action was taken on this bill, and on

July 31, 1914, Mr. Alexander introduced the Joint Resolution previously mentioned (H. J. Res. 311), which was referred to the Committee on Foreign Affairs (Cong. Record, vol. 51, Part 13, p. 13,098); and on August 18, 1914, that committee reported the resolution without amendment, accompanied by a report (*Id.*, Part 14, p. 13,959).

On September 1, 1914, the joint resolution was debated in the House, on a motion to suspend the rules and agree to the resolution (*Id.*, pp. 14,566-14,583).

It appears from these debates and proceedings that the reasons which gave rise to this resolution were as follows:

That of the entire ocean freight traffic, about 2/9ths is package traffic, consisting of manufactured articles, on which the rate is fixed, and not subject to change without giving 30 or 60 days notice to shippers.

That about 7/9ths of the ocean ~~freight~~ <sup>freight</sup> traffic is bulk traffic, consisting principally of staples of agriculture, on which the rate varies from day to day, and hour to hour.

That the domestic price of the staples of agriculture is governed by the export price, which fluctuates with the rise and fall of ocean freight rates on bulk traffic.

That the world's price of the staples of agriculture cannot be steadied until a fixed rate can be established on bulk traffic the same as on package traffic, and that there is no good reason why the shippers of bulk



traffic should not enjoy the same fixity and certainty of rates as the shippers of package traffic.

In other words, the ocean carriers who, in the absence of any supervisory power, and following the course pursued in ocean trade everywhere, have fixed the rates on package traffic, are impliedly criticized because they have not gone further and fixed the ocean rates on bulk traffic. The carriers certainly have not failed to do this with a view to deriving great profits from bulk traffic, as the earnings on their whole business represent but a small return on their capital invested as shown in the succeeding point.

Mr. Alexander's speech in support of the resolution was as follows:

MR. ALEXANDER. Mr. Speaker, the subject of this resolution was called to my attention by Mr. David B. Lubin, who is the permanent delegate of the United States to the National Institute of Agriculture at Rome. He had read my report on steamship conferences and agreements in the domestic and foreign trade, and he was convinced that our Government would be impotent to enforce reasonable rates or stabilize rates on farm products in international trade in the absence of an international agreement, and that is true. In the bill which was drawn to carry out the recommendations of the Committee on the Merchant Marine and Fisheries, House bill 17328, we have gone just as far as we may under the law to bring all the lines, domestic and foreign, under the supervision of the Interstate Commerce Commission, and, so far as those engaged in the

coastwise trade are concerned, to regulate their rates; but many reasons will suggest themselves to gentlemen why it is wholly impracticable for this Government to regulate international freight rates. I have not the time to enumerate them, much less to discuss them in detail, nor is it necessary at this time. The investigations made by the committee showed that, so far as package freight is concerned, the conference lines have a uniform rate, which usually is not raised or lowered until after 60 days' notice. The shippers who appeared before the committee were all unanimous in the opinion that the stabilizing of rates was very important in the export trade, and that it was very desirable that they might know how to make their contracts. They would then know one of the factors—and a very important one—in the price of the commodity they would sell for future delivery, namely, the freight rates to be charged on the commodity. Now, so far as grain is concerned, the testimony before the committee showed that the rate varies daily, if not hourly, often depending upon the demand upon the part of the great ocean liners for ballast. Under the agreement between the conference committee the quantity of grain that one of the ocean liners may carry is limited. Mr. Lubin contends, and with great force, that in order to steady the world's price of the staples it is necessary to stabilize the freight rates on the staples, and that this cannot be done until the ocean freight rate on the commodity from the seaboard to the point of delivery in Europe or

South America or elsewhere in our over-sea trade is known with reasonable certainty. In years past, as the gentleman from California [Mr. KAHN] has said, the operators on boards of trade and chambers of commerce influenced the price of wheat, cotton, and other staples from day to day by giving out information, more or less guesswork and in many instances manipulated, with reference to the condition of crops and the probable yield in the different countries of the world.

The international institute at Rome, in which Mr. Lubin has so ably represented this Government as permanent delegate, has undertaken to correct this evil. The Government reports, the official reports, the forecasts, are made from time to time by the Government agencies of the 54 signatory States to this institute, and are compiled and disseminated to the different countries, and that element of speculation has been largely eliminated. Having accomplished this task, Mr. Lubin is in favor of taking another step. He is an enthusiast, but not an idle dreamer. He is of the opinion that if the 54 nations parties to the international convention of 1905 creating the International Institute of Agriculture, and supporting the institute, can be brought to agree to the establishment of an international commerce commission, vested with power to stabilize the rates or regulate the rates on the staples of agriculture, another essential factor in steadying the world's price of the products of the farm will be fixed and another element of speculation eliminated. I fully realized when I introduced this resolution that we were undertaking a difficult task, but that is no

reason why we should not make the effort. It cannot be accomplished in any other way. **It is an international problem, and can only be solved by international agreement.** This resolution does no more than to authorize Mr. Lubin, in October, to propose to the permanent committee the resolution set out in this joint resolution, which is as follows (resolution quoted):

If they regard it favorably they will present the resolution to the general assembly in 1915. If the general assembly agrees that it is a subject that will promote the interests of the farmers and they regard the time opportune, they will then take steps to call an international conference in 1917 to consider the question of organizing this international commerce commission, to be vested with the powers set out in the resolution. That is the whole question in a nutshell. We all agree that that is the only rational way to get at it. Whether it is possible to accomplish our purpose in that way or not, of course we do not know. That will depend upon the attitude of the nations controlling the larger part of the ocean-borne commerce of the world. I am quite sure it is worthy of the effort. [Applause.]

There were also other speeches in support of the resolution, and two-thirds having voted in favor of it, the rules were suspended and the joint resolution was passed.

On September 2, 1914, the <sup>resolution</sup>~~bill~~ was read in the Senate and referred to the Committee on Commerce (*Id.*, Part 15, p. 14,610); and on September 4 it was

reported back by that committee without amendment (*Id.*, p. 14,707).

On September 9th and 10th the resolution was considered by unanimous consent and passed (*Id.*, pp. 14,867 and 14,917), and on September 19th was approved by the President.

This action by Congress shows clearly that it did not consider that the fixing of ocean freight rates by the lines has been improper, but rather that they have not gone far enough and fixed the rates on bulk as well as package traffic, and that the matter is one for international regulation.

#### **Provisions of Wilson Tariff Act.**

Sections 73 to 77 of the Wilson Tariff Act of August 27, 1894 (28 Stat. 570), which were a substantial re-enactment of the Sherman Anti-Trust Act, with respect to goods imported into the United States from a foreign country, seem strongly to confirm the view that the Sherman Act was never intended to cover the field we have been discussing, as no such enactment was necessary if the Sherman Act already covered the matter.

This was apparently the view taken by the Senate, who has charge of our foreign relations, on the passage of the above sections of the Wilson Tariff Act (Cong. Rec., vol. 26, Part 6, p. 5719; *Id.*, Part 17, pp. 7117-7120).

Section 73 provides:

"That every combination, conspiracy, trust, agreement, or contract is hereby declared to be

contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than \$100. and not exceeding \$5000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than 3 months nor exceeding 12 months."

The other sections are substantially the same as in the Sherman Act.

These sections were expressly kept in force by the Dingley Tariff Act of July 24, 1897, ch. 11, Sec. 34 (30 Stat. 213), and were amended only in minor particulars by the Act of February 12, 1913, ch. 40 (37 Stat. 667).

**II.****Main Appeal.**

The conference system of regulating ocean steamship traffic prevails in all maritime countries of the world and has existed from early days. It arose from the peculiarities of ocean trade, and particularly from the great inequality between passenger steamships with respect to their power to compete, due to difference in size, speed and equipment. This necessitated the fixing of differential rates, in order to avoid destructive rate wars and enable the different lines to devote their resources and energies towards giving the efficient and constantly improving service which trade and travel demanded, and not at all with the purpose of effecting a monopoly.

This system has rendered possible the highly efficient service given by the Atlantic Lines, which has been maintained with but small pecuniary benefit to them, and has greatly increased and developed trade and intercourse with Europe.

**Great Individual Rivalry and Competition between  
Lines.**

That the conference system of formal agreements covering the past twenty years, by reason of the stabil-

ity it has given to the passenger business, has been the means of greatly encouraging individual rivalry and competition between the lines is evidenced by the many magnificent steamers that have been added to the Atlantic service during this period.

The Hamburg-American line, just prior to the war, had added to its service the steamer "Vaterland" and launched the steamer "Bismarck", both sister ships of the "Imperator", each estimated to cost in the neighborhood of \$8,000,000. The Cunard line had added to its service the "Aquitania", a vessel of the same class as the "Lusitania" and the "Mauretania". The White Star line was building the "Britannic", which is similar to the "Olympic". The Holland-American Line had launched the "Statendam", and the North German Lloyd was about to add to its service the "Columbus".

These ships represent millions of dollars of invested capital. They are types of the highest development of modern ship-building, with every conceivable provision for safety and comfort of passengers.

The North German Lloyd express steamer "Kaiser Wilhelm der Grosse" had recently been devoted entirely to steerage and third cabin traffic, and on the other express steamers of the German lines third cabin accommodations are provided, in which the privacy of the passengers is equal to that of the first class.

#### **Heavy Coal Consumption.**

In order to show the great cost of operation of these trans-Atlantic ships, we call attention to the im-



mense amount of coal consumed by them. The coal bill of the Cunard line for 1912 amounted to over £600,000 (Test'y, fol. 4555).

Every knot that is added to the speed of a steamer increases very greatly the cost of fuel and expense of operation.

#### **Small Earnings of the Lines.**

Although the building and operation of these modern ships has involved an enormous outlay of capital and a great increase in running expenses, the lines have received but a meagre return on their investment.

There is probably no form of business in which more enterprise has been shown and less pecuniary advantage derived than that of the transatlantic passenger lines.

The Cunard Line, 80 to 90 per cent. of whose tonnage comes to ports of the United States, has paid dividends on its actual capital averaging but 2.81 per cent. during the thirty years prior to 1912; 3.31 per cent. during the ten years prior; and 2.75 per cent. since the making of Agreement AA (Test'y, fols. 4545-9, 4656-62).

The Canadian Pacific Railway's Atlantic steamship service for the twelve months ending February 1, 1911, showed a net profit of only 3 per cent. on the capital invested, after allowing for depreciation (Test'y, fols. 4797-9).

The dividends paid by the North German Lloyd and Hamburg-American lines have averaged but 3.95

and 5.7 per cent. respectively, during the twenty years from 1892 to 1911 inclusive (Exhibits, fols. 15,825; 15,306).

**Advantages of Conference System Recognized and Maintenance Recommended, after Investigation by the United States and England.**

The great advantages of the conference system, particularly to the shippers of this country, have been recognized and the maintenance of the system recommended in the report of the House Committee on Merchant Marine and Fisheries, of which Mr. Alexander was chairman, which was submitted to Congress in the Spring of 1914. This report was made after an exhaustive investigation into the whole subject of ocean transportation as affecting this country, which was the first investigation into the subject that was ever made by Congress (see Appendix to brief).

In 1909, the Royal English Parliamentary Commission appointed to investigate Shipping Rings and Combinations arrived at a similar conclusion with respect to England (*Id.*); and the public policy of Germany and other continental countries unquestionably favors the maintenance of the system (*Id.*).

**Necessity of Differential Rate in Passenger Business.**

Ocean steamships vary so much in their size, speed and attractiveness of internal equipment that the new steamers, which are constantly being added to the service, attract the travel from the older steamers, even of the same line. This necessitates the fixing of a differ-

ential rate in order to put them all on an equal footing to compete, which is the aim of the conference system.

**Early Conferences.—Fixing of Differential Rate.**

Mr. Hannah testified that conferences existed on this side of the Atlantic between the British lines as early as 1868 and between the Continental lines since about 1875 (fols. 4315, 4317, 4429); that it was part of the work of a conference to regulate rates in order to prevent ruinous competition, by recognizing the weaker lines and giving them a lower rate in view of the fact that they were weaker. He mentions the fact that as far back as 1868, there was a differential of \$3. allowed the National Line by the Cunard Line because of the latter's greater prestige and much faster and finer ships (fol. 4316); that the "Egypt" of the National Line was allowed a differential of about \$2. as against the Inman Line (fol. 4423, p. 1475).

These conferences, however, were mere voluntary meetings of the representatives of the lines, and did not bind the lines to continue in them.

**Rate Wars.—Failure to Secure Differential Rate.**

If a line failed to secure its differential rate the cutting of prices ensued, and this developed into a general rate war between the lines, driving prices down to a ruinously low level, the steerage rate in some cases reaching a point as low as \$10. These rate wars attained great violence between the British lines during the latter part of the eighties and the early nineties, de-

pleting their resources, retarding the construction of new steamers, and ultimately driving many of them out of business. The Inman, National, Guion, Monarch and State Lines, comprising five of the eight British lines then engaged in the transatlantic trade, succumbed from the effect of these disastrous rate wars, due solely to unregulated competition (Hannah, fols. 4308-13, 4376-83, 4385-6; Cauty, fols. 3272-3, 3296).

**Period of Formal and Binding Conference Agreements.**

Some agreements appear to have been entered into in the eighties between the British lines, but they were not of a sufficiently stable character to prevent destructive rate wars (Cauty, fol. 3271), and as ocean trade and travel increased, it became evident that the construction of larger, faster and finer ships, requiring greater outlay of capital, could not be successfully carried out under these conditions; that more formal and stable agreements were necessary between the lines than had theretofore existed in the earlier conferences; and during the nineties and since that time, conference agreements of this character have been entered into in regard to all classes of the passenger business, for short periods of time and subject to renewal and modification as occasion required to meet new conditions.

The systems involved in these agreements are of two kinds, (1) the Differential Rate System and (2) the alternative AA or Pooling System; the purpose of both systems being to equalize conditions and enable each line to preserve its normal traffic.

### **Present Differential Rate System.**

#### **First and Second Cabin.**

This system is shown in the minimum rate agreements, V and W, relating respectively to first and second cabin business, which were entered into between the Continental and British Lines on February 5, 1908 (pp. 145, 134), and which appeared to be still in force, except as they were modified by the addition of new steamers. By referring to these agreements, it will be seen that the passenger steamers of the Atlantic are divided into some sixteen classes, commencing with the Lusitania and Mauretania and ending with the smallest and least favored boats, each class being specially rated. New steamers are to be rated as they come out on a similar basis, such rating to be subject to revision by arbitration in case of difference of opinion (see arbitrations in Peter's Circular Letters, at pp. 4038, 3944, 3948, 4024; 3789, 3828, 4661). Above these minimum prices, each line is at liberty to fix its rate independently of the others.

#### **Third Cabin.--British Business.**

The differential rate system also appears in the third cabin or steerage agreement entered into between the British lines in regard to British business, dated May 23, 1908 (p. 2700).

#### **The AA or Pooling System as an Alternative of the Differential Rate System.**

This system is in force between the Continental and British Lines only with respect to Continental steerage

traffic (Agreement AA, Art. 1, p. 51), and was adopted as an alternative to a differential rate agreement to avoid the great difficulties in fixing the proper differential rates (Cauty, fols. 3276-7).

The purpose of this system is to bring about a periodical adjustment of the temporary fluctuations in the carryings of the different lines so as to give each line a share of the total carryings of all, proportionate to its average carryings for a prior period of years, which is fixed in the agreement as a certain percentage (Arts. 3, 9; Exhibits, fols. 16-20, 7797; Test'y, fols. 3264, 3085). This percentage is subject to modification by agreement of the parties where conditions later warrant it (Test'y, fols. 5450-2). Considerable fluctuations take place in the carryings, as is shown by the extent to which the lines become plus or minus in the pool (Exhibits, pp. 2448, 2917-9). The adjustment of the carryings is brought about by requiring the lines which have carried in excess of their stated percentages or become plus in the pool, to raise their rates if practicable and thus throw the excess of traffic to the lines which have carried less than their percentages or become minus in the pool, and if this is inconvenient or proves to be ineffectual, the lines which have undercarried must reduce their rates to attract travel and bring them back to their fixed percentages (Art. 11). The line which is thus in excess of its percentage is also required to pay to the short-carried lines a compensation of £4 for each excess passenger, which is provided as

a deterrent to a line's exceeding its fixed percentage (Arts. 6, 9).

There is no pooling of profits nor any pooling of traffic beyond the adjustment of these temporary fluctuations in carryings.

#### **General Scale of Rates.**

The general scale of rates for all the lines is adjusted from time to time, but it has been kept at a reasonable level, as shown in Point III.

#### **Origin of the AA System.**

The pooling system above described originated in the Continental steerage agreement of 1892 between the four Continental lines, North German Lloyd, Hamburg-American, Red Star and Holland-American (p. 3). The agreement is still in force with modifications (pp. 157, 2741).

#### **Other Agreements Entered Into with AA.**

At the time Agreement AA was made, there were also entered into Agreements V and W, above referred to, relating to the North Atlantic first and second cabin business, and Agreement X of February 6, 1908, relating to the Mediterranean first and second cabin business (p. 2446); also Agreement Z of February 5, 1908, between the AA lines and the Canadian lines, in regard to Continental steerage traffic, which is similar in form to Agreement AA (p. 2667). Later an agreement was entered into between the AA lines and

the Italian lines in regard to the Mediterranean steerage traffic, which is on the same plan as Agreement AA (Agreement of Feb. 8, 1909, p. 95).

**Admission of Outside Lines to AA.—No Line Refused Admission.**

No line has ever been refused admission to Agreement AA or the Atlantic Conference. Agreement AA was made with a view to admitting outside lines (Art. 22, pp. 66-7; see also p. 36), and it has been carried out in this spirit.

Since Agreement AA was made, the following among other lines have been admitted to the agreement: Russian East Asiatic Co. (Agreement BB of September 1, 1908, p. 2682); Royal Line of the Canadian Northern Steamships, Ltd. (Agreements CC and DD of August 15, 1910, pp. 2413, 2412). The Royal Line has also been admitted to Agreements V and W, relating to first and second cabin business (Agreement EE of August 15, 1910, p. 2410), and to the agreement of May 23, 1908, between the British lines in regard to British steerage business (Agreement of August 15, 1910, p. 2697). An agreement has also been entered into between the British lines and the Scandinavian-American Line in regard to Scandinavian and Finnish business (Agreement of March 3, 1910, p. 2362; see also pp. 3238-42, 3263-4), and the Royal Line has become a party to this agreement (Agreement of August 15, 1910, p. 2359).



### III.

#### **The steerage rates under Agreement AA have been reasonable.**

The high efficiency of the trans-Atlantic passenger service, and the meagre profits derived from it by the Lines, have already been referred to under Point II.

#### **Average AA Steerage Rate about One Cent a Mile, Including Food.**

The average Continental steerage rate of the ordinary steamers of the AA lines has been about \$35 (Test'y, fols. 5244, 5264) and for improved steerage or third cabin on express steamers about \$3 to \$5 more.

The British steerage rates under the agreement of May 23, 1908, relating to British business have been about \$32 and for the Lusitania and Mauretania about \$35 (p. 2700).

The distance from this country to England is about 3,100 miles, and to Bremen and Hamburg about 3,500 miles, which makes the British and Continental steerage rates equivalent to about 1 cent a mile, or slightly more for improved steerage or express steamers, which is certainly a cheap rate of transportation, considering that it includes food.

#### **Government Rate on Panama Line About One and a Half Cents a Mile.**

The distance from New York to Colon is 1,985 miles, and the steerage rate is \$30 on the steamers of

the Panama Railroad, which are owned and operated by this Government (Drake, fols. 4995-6). On this basis the steorage rate for the British lines would be about \$47 and that for the Continental lines about \$52.

Mr. Drake, the vice-president of the Panama Railroad, whose experience with its line of steamers dates back to 1893 when the line was commenced (fols. 4984-5), says that this \$30 rate is sometimes remunerative and at other times not (fol. 4997); that he considers it a well recognized maxim in transportation circles, verified by his own experience, that a steamship line must earn from 12 to 20 per cent. to make it equivalent to 6 per cent. earned by a railroad, owing to the exigencies that affect the operation of a steamship line or vessel that cannot possibly apply to the operation of a railroad (fols. 4988, 5047-9).

**Testimony as to Reasonableness of Conference Rate.**

Mr. Richard, who had been the agent for the Russian Volunteer Fleet and New York and Continental Line, and whose experience as an agent for many lines dated back forty years (fol. 2368), was examined as a witness for the Government and testified that the prevailing rates for steorage passengers were very reasonable (fols. 2439-40); that \$30 to \$45 was a reasonable rate (fols. 2482-3, 2513, 2515, 2758-9, 2773-4), and \$20 an unreasonable one and would drive some lines out of business (fols. 2462-3, 2476, 2513); that the minimum steorage rate fixed by the Italian Royal Immigration Commissioner was about \$40 (fols. 2518,

2810, 2838). He further testified that the elements of first and second cabin capacity and rates and the freight rates must be taken into consideration (fols. 2791-3), and if no freight is carried, passenger rates must be very much higher (fol. 2485); that he based his statement that the prevailing rates were reasonable on the dividends paid by the companies (fol. 2483), and on his forty years' experience as a steamship agent (fol. 2507).

The estimate of £2, 6s, as the expense per head of carrying steerage passengers, which was made by Mr. Thomas of the New York & Continental North West Transport and Uranium Lines, another of the Government's witnesses, includes merely the cost of food and steward's service and "does not cover the coal, does not cover the crew, except the stewards, does not cover any of the officers, does not cover the insurance; does not cover port expenses, does not cover the depreciation" (fols. 2028-9).

Interest on the investment is a large item which is not considered by the witness as an element of cost in the passenger business.

At folio 2063, Thomas admitted that it is impossible to find out what it costs *per capita* to carry passengers; "no man can define that".

Government's witness Cauty, in testifying as to the *per capita* cost of carrying steerage passengers, eliminated the same elements of expense. He said: "That does not take into account what we call the steamship expenses, coal, the upkeep of the ship, the engine re-

pairs, insurance, etc." (fol. 3210). He amplified his answer at folio 3227.

According to some of the witnesses a \$21 steerage rate may produce a slight profit rather than a loss, where the ship sails full as to all kinds of traffic, but this is not a condition which generally exists. The average steerage carryings of the lines, as shown by the tables, *infra*, are not much more than half the full steerage capacity of the ships, due principally to the light eastbound traffic, which necessitates a considerably higher rate than would be required if the steerage were always filled.

#### IV.

**There was no unfair competition by the conference lines. They merely protected their own steerage traffic against the attacks of the outside lines.**

**Average Carryings per Trip of Outside Lines Nearly Equal to those of Conference Lines.**

The average steerage carryings per sailing of the outside lines, both eastbound and westbound, compared favorably with those of the conference lines (see Tables opposite).

**Outside Lines Not Attempting to Do a Remunerative and Legitimate Business.**

The outside lines, carrying as they did practically no first and second cabin passengers and little freight,

**CHARTS**

**TOO**

**LARGE**

**FOR**

**FILMING**

should have kept their rates near the rates of the conference lines, which were reasonable, and adhered to their own published rates and commissions, if they intended to do a remunerative and legitimate business. But they commenced with a published rate from \$7 to \$10 below the conference rate, and kept undercutting and paying a large part of their quoted rates to agents in the form of secret commissions in their effort to draw away the business from the conference lines, and obtained a good share of the business by these methods. The outside lines and not the conference lines were the aggressors.

The reduction in the rate of the conference steamer drew travel from its other steamers as well as from the other conference lines and caused overbooking, which accounts for the large number of passengers appearing in Peters' Circular Letters.

The brunt of this outside competition to the Continent, necessarily fell on the Continental conference lines, and it was because of their complaint that they were put at a disadvantage in the pool that the other conference lines agreed to divide their losses entailed from the reduction in their rates (Exhibits, vol. 6, p. 2831).

A combination is not *per se* unlawful and if it is a reasonable and justifiable one, as the defendants claim the conference system is, it is entitled to defend its own business against outside attack. (See the definition of a "fighting ship" contained in the bill of the Alexander Committee.)

**The Outside Lines had not Built Up a Proper Agency System.**

Mr. Richard and Mr. Strauss had the same agents (Exhibits, fol. 6468), who were not of high standing (Strauss, fols. 2441-2; Exhibits, 6473), and attempts were made to entice away the conference agents (Richard, fols. 2241-2). The character of the agents of the outside lines is stated in the following letter from the New York agency of the Russian East Asiatic S. S. Co. to its home office at Libau, dated Sept. 3, 1908 (Exhibits, p. 2264):

"Your letter of 9/22 August to hand regarding Captains seriously complaining about false information given to passengers about the speed of our steamers which creates a great deal of dissatisfaction amongst passengers who are otherwise satisfied with the passage on our steamers.

"Now that we are in the Conference (enclosed please find copy of circular issue announcing our admittance) we will have a different class of Agents who will not attempt to lie and who will adhere strictly to the truth. Heretofore we have been laboring here with very hard material but it was the best we could get under the circumstances. Now that this is all over we hope to get better satisfaction all around and there will be no lies told by these good agents to secure the business."

Mr. Richard, whose firm were the passenger agents for the Russian Volunteer Fleet, the New York &

Continental Line, and the North West Transport Line until May, 1909, complains of the conference rule, which existed as far back as 1879, prohibiting conference agents from booking for non-conference lines under penalty of disqualification, and this, he says, is the only objection he has to the conference system (fols. 2480-1, 2787-90).

"In case they revoke Rule 9, I agree to raise rates and maintain commissions and follow the rules of the conference" (Richard, fols. 2481, 2441).

If the outside lines desired to avail of the conference agency system, the proper course was to have joined the conference, as did the Russian American Line later on.

**The Russian Volunteer Fleet Was Not Driven Out of Business, nor the Russian East Asiatic Co. Forced to Join the Conference.**

#### **Russian Volunteer Fleet.**

The Russian Volunteer Fleet maintained its principal service between Russia and the Far East under subsidies from the Russian Government.

The traffic on its Libau, Rotterdam and New York line was confined practically to steerage passengers, owing to the lack of cabin passengers and freight.

Its average steerage carryings per sailing during the time it ran to this port were as heavy as those of the conference lines (Richard, fols. 2478, 2797, and table, *supra*), but in 1908 the westbound steerage



traffic on all the lines fell off more than half (see table), and the company decided to suspend its Libau-New York service until the westbound situation improved. It was so stated at the time by its agents, Messrs. C. B. Richard & Co., who received a cable to that effect from the company (Exhibits, fols. 6115-6, 6134, 10,418, 10,511).

**Statement by President of Russian Volunteer Fleet.**

After the present suit was commenced, Admiral Radloff, the President of the Russian Volunteer Fleet, upon noticing an article in the *Shipping Illustrated* of this city giving a statement of the allegations of the petition in regard to his company, wrote the editor of that paper as follows (Deft.'s Ex. 3, Test'y, p. 820):

"RUSSIAN VOLUNTEER FLEET,  
19, Morskaia,  
St. Petersburg,  
12/25 January 1911  
No. 165.

The Editor of the "SHIPPING  
ILLUSTRATED" 22, Thames Street,  
New York.

DEAR SIR:

In your issue of the 7th inst., we find, in an article headed: 'ACTION AGAINST THE TRANSATLANTIC POOL,' mention made of the Russian Volunteer Fleet as '*having been driven out of business*' as a result of the practices adopted by the Pool.

We beg to say that the above statement, as far as it concerns the Volunteer Fleet, is not

correct, as the Committee of the Russian Volunteer Fleet had decided to suspend their Libau-New York line for reasons of their own that had nothing in common with the attitude taken by the Pool.

Believe us, Dear Sir,

Yours faithfully,

(Sgd.) A. RADLOFF,  
President."

While this letter is hearsay evidence, this is true of all the evidence given by the Government on this point.

**Reasons Why the Russian Volunteer Fleet Suspended Its Atlantic Service.**

*The U. S. Monthly and Consular Trade Reports* for October, 1908 (No. 337, pp. 81-2), which is a Government publication, contains the following article on the subject:

"Russia

*"The Voluntary Fleet Gives Up its New York-Libau Line.*

"A translation from a St. Petersburg paper by Vice-Consul William Dawson, jr., states that the North German Telegraph and Correspondence Bureau received the following from Libau, under date of June 20:

'After lengthy deliberations and with the consent of the company's board of directors at St. Petersburg, the Voluntary Fleet last week adopted the important resolution to give up its

line between New York and Libau, which has been in existence two and one-half years. Those on the inside have been aware for some time that on account of the heavy losses caused by this line the company would sooner or later be obliged to discontinue the service. As is well-known, the Voluntary Fleet's trips to New York were called into existence by the avowed desire of directing the stream of Russian emigration toward Libau and at the same time away from the foreign ports, notably German, Dutch and English, to which it was pouring over the German frontier.

The undertaking, which from the standpoint of the political economy of the Russian people was in every way to be commended, soon proved to be unprofitable. In spite of the fact that during 1907 the Voluntary Fleet carried about 22,000 persons to New York and had a good share of the movement in return, the lack of cabin passengers and the complete absence of freight precludes all possibility of maintaining this line at a profit. According to reliable information the company's losses in 1906 amounted to \$250,000, and for the past year \$300,000. For national reasons it was earnestly desired to maintain the line, and the greatest efforts have been made to accomplish this end.

However, in view of the difficulties under which the Russian financial administration has recently labored and given the conviction that for the reason indicated this line offered no prospect of prosperity for the future, it was

decided, according to reports, to give up the service until further order. As a matter of fact there does not exist the slightest probability that this line will be reopened for some time to come, for the exchange of products between two countries such as Russia and the United States which compete in the world market in their principal output—namely, agricultural produce—can never become sufficiently important to maintain a regular steamer service between Libau and New York. It is impossible to build up a line on the steerage traffic alone.’”

**Russian East Asiatic Co.**

The carryings of the Russian East Asiatic Co. had been about half those of the Volunteer Fleet, because it had older steamers and ran in competition with it.

After the Russian Volunteer Fleet suspended its Atlantic service, the Russian East Asiatic Co. was the only line engaged in the direct Libau and New York trade, and later joined the Atlantic Conference voluntarily, as testified to by the Government's witness, Mr. Strauss, whose firm were agents for that line (fols. 2246-7, 2295).

**The Line Known Successively as the N. Y. & Continental, North West Transport and Uranium Line was controlled by the Canadian Northern R. R. Interests, and operated at Low Rates to Aid in Land Colonization along its Railroad, and was not a bona fide Steamship Enterprise.**

This line, which has been run successively under these names, has been run ostensibly as an inde-

pendent line, but has in fact been financed and operated by the same interests as those which control the Canadian Northern Railway of Canada and the Royal Line, which is a party to the pool and maintains rates and commissions.

The defendants claim that this line was not conducted as a *bona fide* steamship undertaking but as a feeder to the railroad's land colonization scheme in Canada, for which purpose it could afford to carry steerage passengers at a loss.

Mr. Richard, whose firm were the general passenger agents of the New York & Continental Line and also of the North West Transport Line until May, 1909 (Exhibits, fol. 848), admitted he had always heard that the same people who were identified with the Canadian Northern Railway were also identified with the New York & Continental Line, the North West Transport Line, and the Uranium Line, and that these people were Messrs. Mackenzie & Mann of Toronto, who built the road, of which Mr. Mackenzie became the President (fols. 2464-6, 2448-9; see also fols. 4866-8).

Most of the charges of unfair competition came from Mr. Thomas, who has been the general manager of the North West Transport Line and of the Uranium Line since Mr. Richard's firm withdrew, and who was also assistant manager of the New York & Continental Line. He was the principal witness for the Government on the subject of unfair competition, and also in regard to what constitutes a reasonable steerage rate.

When he was examined as a witness, the defendants desired to ascertain from him who were the owners of his line and whether it was not controlled by persons who were identified with the Canadian Northern Railway of Canada, but he plainly attempted to conceal this fact.

He was asked on cross-examination who were the officers or persons at the head of his line, and the only person he could name with whom he had dealings was Mr. Henry W. Harding of London, England, whom he understood to be the manager of the company. The witness clearly attempted to convey the impression that Messrs. Mackenzie and Mann and the Canadian Northern Railway were not identified with the Uranium Line. **We ask the Court to read this witness' testimony at the following places in the record (fols. 1998, 2002-8, 2013, 2016-9, 2056-67, 2069-70; see also fol. 1782).**

The defendants afterwards ascertained that Mr. Harding was the Local Secretary for England of the Canadian Northern Railway (Exhibits, fol. 14,788), and that the office of the Uranium Line in that city was in the Canadian Northern Railway's building, in its accounting department (Testy., fol. 5164; Exhibits, fol. 14,848).

When Mr. Thomas was recalled for further cross-examination, which was towards the close of the taking of testimony, he admitted that he remitted the receipts of the Uranium Line to Mr. D. B. Hannah, the Third Vice-President of the Canadian Northern Railway, at Toronto, and that Mr. Hannah was the person whom

he consulted as his superior (fols. 5079, 5082-3, 5126); that Mr. Hannah had guaranteed his contract of employment as agent of the Northwest Transport Line and also his contract with the Uranium Line (fols. 5081-2, 5086-90, 5092-3, 5115, 5117-9), which was signed "Uranium Line by D. B. H." (fols. 5139-40); that Mr. Harding and Mr. Hannah were the only persons with whom he communicated in regard to the company's affairs (fol. 5099).

He further testified that the line had not been making money for three or four years (fols. 5135-6, 5138, 5146) and that its liabilities were more than its assets (fols. 5100-1, 5146); but he said that the persons running the line did not seem to worry; that they appeared to have inexhaustible means back of them (fols. 5094, 5148-9, 5090).

We quote the following extracts from Peter's Circular Letters as showing Mr. Mackenzie's connection with the New York & Continental, North West Transport and Uranium lines, and the affiliation of the Uranium Line with the interests of the Canadian Northern Railway.

**Affiliation of New York & Continental, North West Transport and Uranium Lines with Canadian Northern R. R.**

**Control of the Three Lines by Mr. Mackenzie, President of the Canadian Northern R. R.**

The New York & Continental Line, which ran between Hamburg, Rotterdam and New York, from April to August, 1908, was under the management of

a Mr. Petersen of London, but Mr. Mackenzie, the President and one of the principal stockholders of the Canadian Northern R. R., appears to have been supporting him in the undertaking and supplying the money (see Exhibits, fols. 5798, 10,142, 11,332, 11,376).

The line lost money during the four or five months of its operation, and in January, 1909, the company was reorganized as the North West Transport Line, with the aid of further advances from Mr. Mackenzie, the line still remaining under the nominal management of Mr. Petersen (Exhibits, fols. 11,330, 11,332, 11,375-6, 11,400-7, 11,444-6, 11,497-9, 11,540, 11,558). After this, it stopped at Halifax on the westbound voyage from Rotterdam (see tables, *supra*).

The Northwest Transport Line continued to lose money, and in April, 1910, it was taken over by Mr. Mackenzie, and was thereafter called the Uranium Line (Exhibits, fols. 13,541, 13,595, 13,662). This line also stopped at Halifax on the westbound voyage, but no longer ran to Hamburg (fol. 13,662).

#### **Canadian Northern starts Royal Line.**

The Canadian Northern Railway, in August, 1909, through negotiations conducted by Mr. D. B. Hannah, had bought two steamers for the new line it proposed to run between Canada and Bristol, England, known as the Royal Line, which was opened in March, 1910 (Exhibits, fols. 12,410; 12,955; 13,111-3; 13,463-4).



**Efforts by Conference Lines to Have Royal and Uranium Lines Join the Conference, and Admission of Royal Line.**

In May, 1910, Mr. Mackenzie and Colonel Davidson, the Land Commissioner of the Canadian Northern Railway (Exhibits, fol. 14,787), met a representative of the British lines with a view to negotiating for the admission of the Royal Line and Uranium Line to the Conference. The negotiations which were had and which resulted in the Royal Line becoming a party appear in Peter's Letters and other exhibits, as follows:

(Peter's Letter No. 851, May 27, 1910, p. 4579.)

"The following telegram which I received from the Cunard Line I communicated to the Continental Lines only, as the British Lines I think are already acquainted with its contents, Liverpool: 26/5, 5.25

'On behalf of British Lines Mr. Aitchison Anchor Line met representatives Royal Line London Tuesday. Mr. Mackenzie Colonel Davidson and Mr. Peterson being present, they stated have every wish to work in friendly spirit with conference lines but felt they should **build up agents organization before entering into agreement**, which might limit their arrangements. After discussion were favorably disposed come into agreement but make it a condition that Uranium company should also be arranged with although stated Royal line has no connection with Uranium company, latter are willing to receive approaches from continental lines. Royal line prepared

maintain rates and conference commissions in every respect, Mackenzie returns Canada today but remaining representatives prepared to carry on negotiations.' "

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(*Id.* No. 883, June 25, 1910, p. 4618)

" At the request of the Holland American Line I beg to communicate the following letter of Director J. G. v. Reuchlin dated 23rd instant

' With reference to the interview I had with Colonel Davidson on June 22nd, I may state the following:

' The British lines are aware through the exchange of telegrams which has taken place previously, of the fact that the Continental Lines hold a different view of the nature of the understanding reached in Paris under Minute 149.

' From the report submitted by Mr. Aitchison the Continental Lines had the impression that Mr. Mackenzie and Col. Davidson had shown utter indifference as to coming into contact with the Continental Lines and the latter therefore feared that in formally opening negotiation with these gentlemen the latter might gain the impression that the Continental Lines were showing great anxiety to come to an understanding with them.

' I was therefore gratified to learn from Mr. Aitchison that on his subsequent meeting with Col. Davidson, Saturday last the latter had expressed himself desirous of meeting the Continental Lines in either

London or Liverpool, or even to the extent of going to the Continent for that purpose. Mr. Aitchison further acquainted me with the fact that the proper basis had been found for an agreement on rates and commissions both for British and Scandinavian business westbound and eastbound between the "Royal" and British Conference Lines and that the completion of such an agreement only waited for the Continental Lines' coming to an arrangement with the Uranium Steamship Company. In the meantime having received word from Col. Davidson I went to see him and explained to him that having been informed that he had expressed a wish to see the Continental Lines, and being in London and having received his note, I had much pleasure in *personally* making his acquaintance, but not as a delegate of the Continental Lines, as I had no mission whatever. I told that I was not prepared to discuss either rates or commissions, but that I had simply in view to ask him frankly what his intentions were with the Uranium Steamship Company, which Line, I understood, was being controlled by the Canadian Northern Railway, and was competing with our company in the New York trade in which, to my knowledge, the Canadian Northern Railway as such had no natural interest.

'Col. Davidson replied that I had not been informed correctly, that the Uranium Co. had nothing to do either with the Canadian Northern Railway or with the firm of Messrs. Mackenzie & Mann, but that it should be regarded as a very unwelcome inheritance left to Mr.

Mackenzie personally who is the only one interested in the company.

'Col. Davidson further explained that Mr. Mackenzie would never have started this line on his own initiative but that Mr. Petersen with whom he entertains friendly relations had interested him some years ago in his scheme of starting a direct line from the Continent to Canada and New York. Ever since that moment Mr. Mackenzie has been obliged to invest more money in this enterprise until in the beginning of this year, Col. Davidson had been invited by Mr. Mackenzie to look into the working of this line and its prospects. Col. Davidson had thereupon in February last advised Mr. Mackenzie to either abandon the line entirely or reconstruct it by taking it out of the hands of Mr. Petersen and substituting a more careful and a more economical management. Col. Davidson assured me that Mr. Petersen has now nothing to do any more with the Uranium Steamship Company. I did not want to ask why then Mr. Peterson had been present at the first meeting of Mr. Aitchison regarding the "Royal" Line as I did not consider it wise to show that Mr. Aitchison had reported in detail to the Continental Lines.

'Col. Davidson then said that in consideration of the large sums already expended in this line, Mr. Mackenzie finally decided to go on with it once more. Three steamers were acquired by purchase, the "*Uranium*," the "*Volturno*" and the "*Campania*," and a new company had been formed, "The Uranium Steamship Company."

‘ In the course of the conversation which lasted over an hour and in which the land and rail interests of the Canadian Northern were fully discussed, I received the impression that whilst the Royal Line has been established by the Canadian Northern Railway with the firm intention to maintain it, it will largely depend on the results obtained with the Uranium Line whether the latter is going to be continued. Col. Davidson is fully convinced of the fact that the Canadian Northern Railway as such has no interest whatever in Mr. Mackenzie’s maintaining a steamship service on New York. The passengers landed at Halifax are naturally to a certain extent interesting to their rail interests, but the majority of them lands in New York where practically all the cargo is discharged, and eastbound all the cargo loaded, whilst the eastbound passengers come exclusively from the United States.

‘ Col. Davidson at the end again approached the question as to whether I could not agree rates with the Uranium Co., but I told him that I was not prepared to discuss any agreement. He then asked me if I would report to the Continental Lines about our conversation and said that he should like to meet the Continental Lines but that he was leaving for Canada on July 7th. I replied that as far as I could see no meeting of the Continental Lines would take place before that date. Col. Davidson then continued that there were practically no more differences between Mr. Aitchison and himself with regard to the Royal Line but that he understood that the latter’s admittance to the British Conference

was dependent on an understanding being arrived at between the Continental Lines and the Uranium Steamship Co. I confirmed this, whereupon Col. Davidson remarked that he could not admit that these two questions should be mixed up; for him these were two separate questions which should be treated separately.

‘ I consider this a very important point because it shows that there is great anxiety on the part of the Royal Line to be admitted to Conference. This should make the lines cautious; for the very reason why Col. Davidson wishes to separate these two questions, the lines must combine them.

‘ I may add that our conversation was carried on in a most friendly spirit and ended in the promise being made by Col. Davidson to return my visit in Rotterdam next week.

‘ As I had no authority to act as a representative of the Lines, I refrain from making any recommendations. I judge that within short the Continental Lines after they shall have consulted each other will be in a position to state to the British Lines which course in their opinion should be pursued in dealing with the Royal and Uranium Lines; in the meantime I think no further steps should be taken.

Yours truly,

Signed J. G. REUCHLIN.’ ”

(Peter's Letter No. 910, July 15, 1910, p. 4681.)

" The Holand America Line write :

' Although it is to be borne in mind that it is a rumor emanating from Mr. Peterson, we consider it of sufficient interest to the Lines to inform them that according to our informant it is said to be the intention of the Canadian Northern Railway to lay up the Royal Line steamers "*Royal Edward*" and "*Royal George*" by the end of October on account of their heavy running expenses and to substitute these steamers in the Bristol Line by those employed at present by the Uranium SS. Co. in the Rotterdam service, thereby discontinuing the latter.' "

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(*Id.* No. 949, Aug. 16, 1910, p. 4729)

" Last night I received following telegram from the Secretary of the N. A. P. C.:

' Arrangements concluded with Royal Line who enter British and Scandinavian westbound third class rate agreements on same lines as Canadian Pacific and same rates as Empress steamers, Continental business westbound: Royal Line to charge not less than lowest rate of any British Canadian line and **only to carry Uranium passengers in the event of steamer breaking down** of which they must produce satisfactory evidence. Eastbound: Royal line joins subsidiary agreement to AA with percentage of one decimal fifteen. For first and Second class business join Agreements V and W taking same rates as Empress steamers'."

(Oelrichs & Co. to N. G. Lloyd, Oct. 7, 1910, p. 2951):

"Today we received a visit from Mr. William Phillip, Traffic Manager of the Canadian Northern Line, which, as you know, supports the Royal Steamship Line between Bristol and the Canadian ports, and which was admitted to the conference on the other side only a short time ago.

"Mr. Phillip advises us that they had already considered putting more steamers into service to increase the same and, of course, in this connection had thought of the steamers of the Uranium S. S. Co., which was supported by some of their principal stockholders. We intimated to Mr. Phillip that the withdrawal of these steamers from the New York service would undoubtedly help adjust the existing difficulties here, as Mr. Phillip since his connection with the Royal S. S. Co. has undoubtedly always endeavored to conduct the business in conformity with the agreement and the existing regulations and usages. Today, also, he repeatedly expressed the opinion that it was absolutely not necessary to resort to measures, such as had been used by the S. S. Co. mentioned, the Uranium S. S. Co. and its predecessors."



We believe that all the charges of unfair competition made by Mr. Thomas originated with him *personally* and not with his line from what follows:

**Alexander Committee's Inquiry.**

When the Alexander Committee was in session, it requested United States Consuls to furnish reports upon "Methods and practices of Steamship Lines, etc." In compliance with this request the American Consul General at Rotterdam made a report dated June 8, 1912, which was published in the record of the proceedings of the Alexander Committee, Vol. 3, page 88.

It is evident from this report that the only grievance of the Uranium Line was that it was unable to transport passengers through Germany on account of the German Government regulations.

The following extracts from this report refer clearly to the Uranium Line, as no other non-conference line meets the description given:

" The regular steamship lines running to the ports of the Netherlands and engaged in the foreign carrying trade of the United States comprise the Holland-America Line, the Uranium Steamship Co. and the Russian-American Line. The first two companies maintain regular services between Holland and the United States, whereas the Russian-American Line steamers only call at Rotterdam on the way from America to Russia.

\* \* \* \* \*

" The Uranium Steamship Co. is reported to be owned and controlled by the Canadian

Northern Railway. It carries on a fortnightly passenger and freight service to New York via Halifax, at which latter port it lands passengers and discharges cargo for Canada before proceeding to New York.

\* \* \* \* \*

" Shippers and importers here deny that the rates charged by the various steamship lines are detrimental to commerce or trade relations with America, and even the \_\_\_\_\_ an opposition line to the Holland-American line—which latter is supposed to belong to the 'pool'—declines to say that any undue competition or discrimination in rates is practiced by the 'pool' lines, except in a certain instance, as stated below.

" I beg here to quote some expressions obtained from the \_\_\_\_\_ of the aforementioned \_\_\_\_\_ and from certain shippers and importers, who have been interviewed by this office.

\_\_\_\_\_ of the \_\_\_\_\_, upon being requested by the writer to state any grievance which he might have against the so-called 'pool' lines forming the steamship combination plying between Europe and the United States, replied that he had no definite charges to make, except as follows:

" The \_\_\_\_\_ Co., not being a member of the North Atlantic Conference, cannot bring passengers through any part of the German Empire. Russian passengers, whether from the north or south, have to be routed over Krakau (Austrian-Russian frontier); and

thence to Vienna—Basel, Switzerland—Delle, Swiss French frontier—Nancy and Belfort, France—Antwerp, Belgium—and finally to Rotterdam. Austrians and others are all routed by way of Vienna, and then the route already shown is followed. This long, circuitous route not only inflicts considerable hardship on the passengers, but is a great source of expense to the company—our rate must absorb the difference between travelling by way of Germany and the route prescribed herein.

\* \* \* \* \*

“When the instruction to furnish a report *re* the ‘Methods and Practices of Steamship Lines, etc.’, was received from the Department of State, the writer went at once to the aforementioned\_\_\_\_\_of the\_\_\_\_\_

\_\_\_\_\_Line and invited him to make any statement or any complaint he might desire regarding the actions, discriminations, and general methods of any steamship combination or ‘pool’ which he might know to exist, but the foregoing statement was all he could be induced to make. \_\_\_\_\_ was asked specifically to state whether or not the\_\_\_\_\_

Line had even tried to prevent him from getting passengers or freight at this port, or had offered lower rates, in order to get traffic away from the\_\_\_\_\_Line, but these questions were answered in the negative.”

Government’s counsel, on the argument of the present case in the court below, announced that they withdrew any further contention in regard to the con-

trol stations on the German frontier, as they had come to the conclusion that they were under Government supervision. As the grievance which is referred to in the above consular report involves substantially the same point, no further discussion of the subject seems necessary. The Uranium Line was not licensed to transport immigrants through German territory.

## V.

**The right of the conference lines to receive a commission or commercial allowance from the railroads for undertaking the sale of their tickets in Europe and this country by means of the conference agency system cannot be raised in this suit, as this point is not pleaded in the petition and the introduction of evidence thereon was duly objected to by the defendants (fols. 1080, 1208, 2426).**

The granting of a commission or commercial allowance to the steamship lines by the railroads has existed since about the middle of the eighties, in connection with the arrangement between them for the routing of passengers through the immigrant station at this port. (10 Interstate Commerce Com'n Reports, 27.) A sufficient consideration exists for the payment of this commission, as the steamship lines completely relieve the railroads of the work of selling their railroad

tickets in Europe and this country, this service being performed by the conference agency system. The agency system of the outside lines was evidently not such that the railroads were willing to entrust them with their business.

The defendants have not attempted to offer proof on this subject, because the matter is not presented by the petition in this suit.

CHOATE, LAROCQUE & MITCHELL,  
Solicitors for North German Lloyd.

WM. G. CHOATE,  
JOSEPH LAROCQUE,  
NELSON SHIPMAN,  
Of Counsel.

## **APPENDIX.**

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### **Policy of United States in regard to Ocean Transportation.**

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**From Report of Alexander Committee (pp. 295-303).**

#### **Advantages of Shipping Conferences and Agreements in the American Foreign Trade.<sup>1</sup>**

Practically all steamship representatives who testified before the Committee, as well as a majority of the leading American exporting and importing firms who expressed their views on the subject to the Committee, contended that shipping agreements, conference relations, or oral understandings which steamship lines have effected among themselves in nearly every branch of our foreign trade are a natural evolution and are necessary if shippers are at all times to enjoy ample tonnage and efficient, frequent, and regular service at reasonable rates. Such agreements, it is contended,

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<sup>1</sup> The reader is referred to the "Summary of replies received by the Committee in answer to its circular letter of Feb. 18, 1913, relating to the advantages and disadvantages of steamship agreements and conferences," published in Vol. 2, pp. 1397-1408 of the Committee's proceedings. This summary represents the views of leading exporting and importing firms operating at our most important ports. Portions of this summary are reproduced in this chapter. The reader is also referred to the report submitted to the Committee on the Merchant Marine and Fisheries by the Committee appointed by the representatives of steamship lines maintaining established services from New York to foreign countries, including Porto Rico and the Philippines, under date of Mar. 3, 1913. This Report is published in Vol. 2, pp. 1357-1374.

are a protection to both shipper and shipowner. To the shipper they insure desired stability of rates and the elimination of secret arrangements with competitors. To the shipowner they tend to secure a dependable return on the investment, thus enabling the lines to provide new facilities for the development of the trade. Furthermore such agreements are held to furnish the means for taking care of the disabilities of the weaker lines, whereas unrestricted competition, based on the survival of the fittest, tends to restrict the development of the lines and in the end must result in monopoly. Briefly outlined, the advantages secured through agreements and cooperative understandings, as presented to the Committee, are the following:

### **I. Improvement in service:**

#### **1. Regularity of service, resulting in the following advantages:**

(a) Opportunities to merchants for shipping are increased, resulting in a much greater increase in the volume of trade, especially to new or remote markets, than would be the case if goods could be supplied only at irregular intervals.

(b) Fixed dates of sailings at regular intervals enable shippers to work with smaller stocks than they otherwise could, thus reducing unnecessary risks, as well as storage charges.

(c) Makes unnecessary the engaging of cargo space considerably in advance, and shippers incur

no penalty or other inconvenience if unable or unwilling to ship goods at the last moment.

(d) Merchants are enabled to make forward contracts for the delivery of goods at a definite date. This factor is important in connection with stability and uniformity of rates. In view of both factors merchants can make contracts for forward delivery at a definite date and price, including cost, freight, and insurance. Such contracts are of vital importance in the trade of to-day, which is largely conducted in large quantities and on the basis of orders placed months ahead and calculated on a small margin of profit.

(e) Without regularity of service in the long-distance voyages, or in the new and undeveloped services, American merchants and manufacturers would be operating at a great disadvantage as compared with European merchants, who now have the benefit of a more highly developed service from European ports to foreign markets.

(f) A better distribution of sailings is secured. Under unrestricted competition a number of vessels may sail from the same port within a day or week, resulting in no sailings from that port for a considerable period thereafter. Under a system of co-operation, however, both the time and ports of sailings are agreed upon, thus "avoiding the waste involved in several ships calling at ports which require only one, and giving an excess tonnage on



one date and a corresponding lack of tonnage at other times."

(g) A large portion of American exports coming from the interior, it follows that, with regular sailings, goods arriving late and missing one steamer may be dispatched by the next steamer of another line, thus causing only a short period of waiting, with the result that unnecessary port charges are avoided, the accumulation of goods is prevented, and the loading and delivery of cargo is facilitated.

**2. Greater security is given to capital invested in the steamship business** and because of this greater security shipowners are enabled to supply an adequate number of vessels of a higher class and greater speed than the ordinary tramp. Moreover, conditions surrounding most trades are dissimilar as regard the depth of water at the ports, the nature of the cargo offered, and the quantity of freight moving during certain seasons. By giving vessel owners a dependable return on the investment they are enabled to provide new facilities for the development of the trade and to adequately adapt the sailings, speed, and equipment to the particular trade. To many merchants the adaptability of the service to the requirements of the trade is highly essential, because of the nature of their exports and imports. The benefits claimed for this advantage are the following:

(a) Cargo is delivered in better order and with greater dispatch and regularity.

(b) Insurance premiums on cargo are reduced, and the rate of insurance may be counted upon as more uniform and stable, thus again favoring merchants in making contracts for the forward delivery of goods.

(c) Loss of interest on the cargo while in transit is reduced.

(d) Shippers are relieved of anxiety as to the class of vessel by which their freight will be shipped.

## **II. Stability of rates over long periods of time:**

1. Removes the inconvenience which would exist if merchants and shippers were obliged to quote different propositions on nearly every consignment, thus eliminating what was formerly an undesirable speculative risk under the open competitive system. A uniform selling price in foreign markets is considered highly essential by merchants. Moreover, conference lines seek to give reasonable notice of alteration in rates, and when increasing their rates shippers are allowed to declare outstanding contracts at the lower rate.

2. Reduces the complaints from buyers abroad. American exporters assert that during periods of rate competition complaints from foreign buyers are numerous if sales to them do not happen to be on the lowest basis of cost and freight, while if there is uniformity in rates, even though these rates be on a higher level, it is seldom that foreign consignees make complaints.

3. Enables shippers and merchants to calculate laid-down costs and sell goods for delivery in the future. American exporters assert that such contracts for future delivery are to-day a necessity, and in this respect nothing is regarded so detrimental to the export trade as uncertainty regarding sailings and violent fluctuations in freight rates. Fixed rates under a system of co-operation, on the contrary, make possible the contracting for space for months, for a year, or even longer in advance, if desired. Such facilities are enjoyed by foreign exporters to competitive markets, and it is essential that American shippers should be placed on an equally favorable basis. Prominent exporting firms have again and again asserted to the Committee that they have experienced various rate wars during the past 10 to 15 years and are convinced that the present condition of fixed rates and regular sailing opportunities places all merchants upon the same basis as regards their estimates on contracts and produces much better results for the exporter and manufacturer than could be possible under the old order of things.

4. During periods of rate cutting buyers abroad generally pursue a policy of buying from hand to mouth instead of placing large orders for shipments ahead, because they never know what the goods will cost them by the time the same are received. If they foresee serious fluctuations in rates during the one or more months which are required to dispose of large lots of

merchandise, they prefer to buy small lots, even at a greater cost, in order to have a chance to meet their competitors.

5. During periods of rate cutting steamship owners are reluctant to make forward contracts for the carriage of freight because of unwillingness to sell cargo space for the future at a loss.

6. While competition in rates between conference lines ceases, competition in facilities continues. Although the conference system largely results in placing rates outside the influence of competition, by pursuing a policy of charging "what the traffic will bear," these rates must ultimately be reasonable for the following reasons :

(a) It is to the interest of the lines not to charge rates detrimental to the development of traffic. Shipowners depend for success on the good will of shippers, and to build up business must establish rates which will enable their American clients to compete successfully with foreign merchants engaged in the same trade.

(b) Shippers are not placed at the mercy of the conference lines, because in nearly all the important branches of the American foreign trade there is competition from regular lines serving European merchants to the same ports. The lines serving American merchants must meet the rates

of the regular lines trading to the same ports from foreign countries. In other words, world conditions govern ocean rates to and from the United States.

(c) If the rates of the regular lines, to quote the New York committee, "should exceed or even approximate the chartered rate for tramp steamers, large shippers immediately protect themselves by the employment of tramps for the transportation of their shipments. Small individual shippers who can not accumulate merchandise in quantities sufficient to justify the charter of tramp steamers are at such times served by charter brokers, who are always ready, when rates by the regular lines advance to such a point that a profit can be made by charter, to lay chartered ships on the berth, themselves accumulating the shipments of numbers of small merchants, who by this means can always protect themselves against oppression" (Vol. 2, p. 1363).

Despite the great increase in ocean rates in recent years the great majority of leading exporting and importing houses which have expressed their views on the subject to the Committee consider the present rates charged by the steamship lines as fairly reasonable when compared with charter rates prevailing the world over, and taking into consideration the capital invested, the increased cost of operation, the better character and

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greater speed of the vessels, the greater regularity of sailings, the maintenance of depreciation and sinking funds, the facilities of the ports of call, and the frequent presence of return cargo. While many of the firms express a desire for a lower level of rates than exists to-day, provided they are uniform, they frankly admit that the present high rates, as long as they are steady over considerable periods of time and equally applicable to all without rebates or other special favors, do not militate against them nearly so much as would a lower level of rates if the same was a fluctuating one and was accompanied by irregularity in sailings. Moreover, the large increase in the number of steamers and in their size during the past 15 years in nearly all divisions of our foreign trade is pointed to as showing the desire of the lines to keep pace with the growth of the country's export trade. It was also the general assertion that the regular lines give shippers advantages contrasted with tramp steamers. Not only are their rates uniform and their sailings reasonably regular, but their steamers are faster and their service better, and the main these advantages overbalance the increase in rates.

### **III. Uniform freight rates secured to all merchants.**

Uniform rates protect the small against the large shippers, and relieve all shippers from the effects of overhand discrimination. Under open competition powerful shippers, or combinations of shippers, can obtain preferential rates, while under a system of co-operation it is not to the interest of the conference to

give special terms to powerful clients. Rate wars are detrimental to the interests of small shippers because the object in every rate war is to obtain the freight of large shippers by offering special rates. The inevitable result of rate wars is a gradual monopolization of the trade in given commodities by the more powerful shippers.

Almost without exception, the testimony before the Committee of conference line representatives shows that it is the purpose of their lines to charge uniform rates and to extend equal opportunities to all shippers. Practically all shippers, also, who in their statements to the Committee were favorable to agreements and conferences, took the view that to maintain equal treatment toward small and large shippers it is absolutely necessary that steamship lines should be allowed to co-operate, and that the improvement toward greater fairness between shippers is due to the fact that the lines have co-operated. Competition in the steamship business was regarded by them as the demoralization rather than the life of trade; as the means of introducing uncertainty instead of certainty, and inefficiency instead of efficiency; and that, inevitably, while all shippers are placed ultimately at a disadvantage through open competition, the small shipper fares much worse than his stronger competitor.

**IV. Prevent the elimination of weaker lines in the various trades.**—Unrestricted competition, based on the survival of the fittest, tends to restrict the develop-

ment of the lines and in the end results in monopoly. Just as rate wars result in the monopolization of trade by the larger shippers, so also do they result in the monopolization of the carrying trade by one or a few of the most powerful carriers. This is especially true in the long-voyage trade where pooling becomes desirable. Here equal rates cannot be charged by all the lines in a given trade unless all are equal in speed and equipment. High-class freight, paying the most remunerative rates, would go to the best ships, while the least remunerative cargo would be shipped by the inferior boats. As reported by the New York Committee of steamship representatives: "By means of pooling the weaker line is compensated for its failure to obtain a fair share of the more remunerative goods and by living alongside the strong line adds to the total of the shipping facilities which the trade may reasonably require." (Vol. 2, p. 1368.)

In addition to the combinations by agreement there are numerous instances of consolidations among steamship lines by actual amalgamation or through stock control of subsidiaries. (The most notable examples of such consolidations are the International Mercantile Marine Co., the Royal Mail Steam Packet Co., the Hamburg-American Lines, and Furness, Withy & Co.). This movement toward actual consolidation by ownership, various witnesses have emphasized, would have taken place more rapidly and on a much larger scale if the making of steamship agreements and conferences had been impossible. In



the absence of co-operation through written or oral agreements, according to these witnesses, only two alternatives present themselves, viz., consolidation by actual ownership or the elimination of the weaker lines through cut-throat competition.

**V. Maintenance of rates from the United States to foreign markets on a parity with those from other countries,** thus enabling American merchants to compete successfully with foreign merchants. It has been the contention of all the conference line representatives who have appeared before the Committee that their lines make every effort to keep American rates to foreign markets on a parity with European rates. The Committee has received only 27 complaints from exporting interests charging that American and European rates to the same destination are not kept on a parity, to the detriment of their business; and it should be noted that less than half of these complaints present any definite data tending to confirm the complainant's charge. A majority of the complaints are general in character and merely call attention to the desirability of having some properly constituted authority investigate this subject from time to time. In answer to these charges the New York Committee of steamship line representatives maintains that—

while occasional differences arise, as a rule shippers are not charged higher rates from this country than shippers in Europe are called upon to pay on the same commodity. In this respect

the lines running from ports of the United States are at a decided disadvantage compared with the European services, because the classes of cargo offered from American ports are of lower grade than those received by the European lines. A ship sailing from Europe will obtain better freight earnings because it carries a larger percentage of high-class cargo, while the expenses incurred in United States ports are always considerably higher than those of a vessel loaded at European ports. Besides, many of the lines running from this country to foreign ports, unlike the European lines, obtain no return cargoes, and are obliged to return to our ports either directly in ballast, or via some other loading port. These facts tend to increase the running expenses of the American services and would therefore justify a somewhat higher freight rate from American ports.

**VI. Reduction in the cost of service, eventually resulting in lower freight rates for a high standard of service.**

1. By eliminating wasteful competition among the lines, thus reducing the aggregate cost of service of all the lines.
2. By arranging the order of the sailings of the several lines at definite dates, and by regulating the sailings of the vessels of the various lines in such a manner as to prevent a number of vessels calling at ports which require only one at a given date.

**VII. Cost of service can be more economically distributed over the traffic so as to develop the trade.**

1. By reducing rates on articles where the rate would bear too heavily, and securing compensation on other items where the value and size justify the same.

2. By enabling the lines to view the trade "not only as it is, but as it may become." Certain ports may be placed on a reasonable footing in freight rates, although the present movement of freight would warrant much higher rates. This is especially true where pooling is practiced. "In connection with the operation of a steamship conference," as reported by the New York Committee,

poolings is nothing more than an equalization of expenses and earnings by the component members of a conference with the object that the conference shall furnish all the facilities that are demanded for the transportation both of profitable and unprofitable cargo and for the accommodation of the least profitable as well as the most profitable ports. Under its operations regularity of service is maintained, whether full cargoes are offered or not, whether the cargoes offered at any particular time be of a more or a less profitable kind, and whether the going rates as embodied in the tariff be profitable as compared with the general market value of tonnage or not; it enables the conferees to give service within the area of the conference operations at small or unimportant ports, often at a loss, which would have to be neglected unless such loss could be equalized by being brought

into a division of the earnings with the other vessels which serve the more important ports. The conferees, in substance and effect, become partners for the purpose of supplying tonnage for the particular trade in which the pool operates, and they divide their earnings and losses in proportion to the capital represented by tonnage which is furnished to supply the needs of the trade. (Vol. 2, pp. 1367-1368.)

3. By increasing the number of sailings to the smaller ports. On most routes there are many ports of destination which should be served, and no one owner could serve all except at great expense, such as extra steaming and port charges, and by greatly prolonging the voyage to the dissatisfaction of consignees. The natural tendency where all lines are competing would be for each owner, in order to compete in rates and speed, to avoid extra expenses and loss of time by not calling at the comparatively unimportant ports. Without pooling, it is asserted, the United States would have no direct communication to-day with many of the minor ports throughout the world whose aggregate trade with this country is very considerable. If the pooled lines, however, have agreed to compensate each other for the losses, these undesirable ports will be served as may be reasonably required.

4. By equalizing the earnings on large contracts over the members of a joint service. As expressed by the New York Committee,

Our large manufacturers and exporters have extensive outstanding contracts for the supply

of rails, locomotives, car material, bridge work, oil, etc., to various ports. No one service alone could possibly handle such products. Shippers are often obliged at stated periods to make large shipments of a kind of material which would be quite unsuitable for a steamer, such as rails, on which the earnings would be much below those of succeeding steamers which would carry other portions of construction material covered by the same contract, the rates for which would be far more remunerative. Only a joint service which could equalize the earnings under the whole contract would carry the materials covered by these large contracts without charging freight rates so prohibitive as to deprive the American manufacturer of the opportunity of securing the contracts in competition with foreign manufacturers. So the conference lines are able to maintain their schedules and provide for the export trade even at a loss to the individual ship. (Vol. 2, pp. 1368-1369.)

\* \* \* \* \*

**From "Recommendations" of the Committee (pp. 416-7).**

These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to co-operate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated.

The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, that can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of co-operative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors.

**Proposal of the United States to other Countries for  
the Establishment of a Permanent International  
Commerce Commission on Merchant Marine and  
on Ocean Freight Rates.**

**1914-5.**

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(38 Stat. 779.)

**Joint Resolution of Congress.**

[H. J. Res. 311.]

Joint Resolution Instructing American delegate to the International Institute of Agriculture to present to the permanent committee for action at the general assembly in nineteen hundred and fifteen certain resolutions.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That in accordance with the authority of letter (f) of article nine of the treaty establishing the institute, which provides that it shall "submit to the approval of the Governments, if there be need, measures for the protection of the common interests of farmers," the American delegate to the International Institute of Agriculture is hereby instructed to present (during the nineteen hundred and fourteen fall sessions) to the permanent committee the following resolutions, to the end that they may be submitted for action at the general assembly in nineteen hundred and fifteen, so as to permit the proposed conference to be held in Rome during the fortnight preceding the session of the general as-

sembly of the institute in nineteen hundred and seventeen:

" RESOLUTIONS.

"The general assembly instructs the International Institute of Agriculture to invite the adhering governments to participate in an international conference on the subject of steadying the world's price of the staples.

"This conference shall consist of members appointed by each of the governments adhering to the institute, and is to consider the advisability of formulating a convention for the establishment of a permanent International Commerce Commission on Merchant Marine and on Ocean Freight Rates with consultative, deliberative and advisory powers.

"Said conference to be held in Rome during the fortnight preceding the session of the general assembly of the institute in nineteen hundred and seventeen."

Approved, September 19, 1914.



**International Institute of Agriculture at Rome, Italy.**

**Created by Convention between the United States and 39  
Other Powers.**

**Signed at Rome, June 7, 1905.**

Ratification advised by the Senate, June 27, 1906.

Ratified by the President, July 7, 1906.

Ratification Deposited with the Gov't of Italy,

Aug. 31, 1906.

Proclaimed January 29, 1908

(35 Stat. 1918).

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The Convention recites that in a series of meetings held at Rome, from May 29 to June 6, 1905, the delegates of the Powers convened at the Conference for the creation of an International Institute of Agriculture, and agreed upon the Convention, to be dated June 7, 1905.

The important provisions of the Convention are as follows:

**ARTICLE 1.**

There is hereby created a permanent international institute of agriculture, having its seat at Rome.

**ARTICLE 2.**

The international institute of agriculture is to be a government institute, in which each adhering power shall be represented by delegates of its choice.

The institute shall be composed of a general assembly and a permanent committee, the composition and duties of which are defined in the ensuing articles.

#### ARTICLE 3.

The general assembly of the institute shall be composed of the representatives of the adhering governments. \* \* \*

#### ARTICLE 4.

The general assembly shall elect for each session from among its members a president and two vice-presidents.

The sessions shall take place on dates fixed by the last general assembly and according to a programme proposed by the permanent committee and adopted by the adhering governments.

#### ARTICLE 5.

The general assembly shall exercise supreme control over the international institute of agriculture.

\* \* \* \* \*

The presence at the general assemblies of delegates representing two-thirds of the adhering nations shall be required in order to render the deliberations valid.

#### ARTICLE 6.

The executive power of the institute is intrusted to the permanent committee, which, under the direction and control of the general assembly, shall carry out the

decisions of the latter and prepare propositions to submit to it.

#### ARTICLE 7.

The permanent committee shall be composed of members designated by the respective governments. Each adhering nation shall be represented in the permanent committee by one member. However, the representation of one nation may be intrusted to the delegate of another adhering nation, provided that the actual number of members shall not be less than fifteen.

\* \* \* \* \*

#### ARTICLE 8.

The permanent committee shall elect from among its members for a period of three years a president and a vice-president, who may be re-elected.

\* \* \* \* \*

#### ARTICLE 9.

The institute, confining its operations within an international sphere, shall—

(a) Collect, study, and publish as promptly as possible statistical, technical, or economic information concerning farming, both vegetable and animal products, the commerce in agricultural products, and the prices prevailing in the various markets;

(b) Communicate to parties interested, also as promptly as possible, all the information just referred to;

(c) Indicate the wages paid for farm work;

(d) Make known the new diseases of vegetables which may appear in any part of the world, showing the territories infected, the progress of the disease, and, if possible, the remedies which are effective in combating them;

(e) Study questions concerning agricultural co-operation, insurance, and credit in all their aspects; collect and publish information which might be useful in the various countries in the organization of works connected with agricultural co-operation, insurance, and credit;

(f) Submit to the approval of the governments, if there is occasion for it, measures for the protection of the common interests of farmers and for the improvement of their condition, after having utilized all the necessary sources of information, such as the wishes expressed by international or other agricultural congress or congresses of sciences applied to agriculture, agricultural societies, academies, learned bodies, etc.

All questions concerning the economic interests, the legislation, and the administration of a particular nation shall be excluded from the consideration of the institute.

Annual appropriations are made by the United States for its share of the expenses of the Institute and salary of the delegate (34 Stat. 635; 35 *Id.*, 177, 678; 36 *Id.*, 343, 774; 37 *Id.*, 101, 693; 38 *Id.*, 448, 1122).

## **Steadying the World's Price of the Staples.**

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**Resolutions by  
the Congress of the United States  
Presented to the  
International Institute of Agriculture.**

**(February 27th, 1915.)**

The President. I wish to remind the Permanent Committee that the resolution passed by the United States Congress, which Mr. Lubin, the American delegate, will now present, was already communicated to the Committee last October. As the delegate was then in the United States it was decided to defer action until his return. I now give him the floor.

Mr. Lubin (*delegate of the United States*). In accordance with instructions from the Government of the United States, I herewith present to the Permanent Committee the following resolutions of Congress:

(Here follows the Joint Resolution as passed.)

I now move that the proposal contained in the above resolutions be placed on the program of the next General Assembly.

The President: Gentlemen, you have heard the motion. What is your pleasure?

Mr. Dop (*delegate of France*): In the first place I wish to express our thanks to the Delegate of the

United States, and through him to the government of his country. By placing before the Institute so important a question as that of ocean freight rates, the United States is taking a direct and effective step towards the solution of a problem which is of the greatest economic and political importance to the whole world. Ocean freight rates have become the pivot on which turns the whole problem of the cost of cereals. It is therefore both the duty and the interest of the International Institute of Agriculture to accept with the greatest favor the proposal laid before it. Consequently I feel justified in stating that my government will be quite willing to accept the proposal made by the Government of the United States.

Mr. de Miklos (*delegate of Hungary*). I wish here to declare that my government has authorized me to give its adherence to the proposal made by the Government of the United States that the next General Assembly should deal with the question of ocean freight rates.

Mr. Zabiello (*delegate of Russia*). I wish to congratulate Mr. Lubin on the great success he has had and on the valuable work he has performed in his country by getting the Government of the United States to ask that the question of ocean freight rates be placed on the program of the General Assembly. The proposal is one of the greatest importance, more especially for my country, which, in the matter of ocean freight rates, is almost entirely dependent on other countries. I can only express my entire support

of the proposal that the question be made part of the program of the next General Assembly.

Dr. Muller (*delegate of Germany*). I wish to associate myself to the congratulations which have been addressed to Mr. Lubin for his initiative. I have not been instructed to make a special declaration on the motion before us, but I can state that my government takes a great interest in the question. If the proposal is to be brought before the General Assembly or a special conference it is necessary that a preliminary study be made. Consequently I would ask that the Secretary General be instructed to take up the subject.

Mr. de Pozzi (*delegate of Austria*). In the first place I wish to declare myself heartily in favor of the motion presented by Mr. Lubin. I make a motion that a reporter be at once named to study the question along with the proper Bureau of the Institute.

Sir James Wilson (*delegate of Great Britain*). I wish to give my entire support to the motion presented by Mr. Lubin that the resolutions of Congress be placed before the next General Assembly. I agree, however, with the President that next October will be the proper time for deciding whether the Bureau should be ordered to draw up a report on the subject dealt with in the resolutions passed by the Congress of the United States which call for a special conference to be held.

Mr. Aldunate (*delegate of Chile*). As the representative of a country which does not possess a merchant marine, I deem it proper for me to say a few words.

The whole of Latin America has at present to submit to the freight rates formed in the great countries which possess powerful merchant marines. It is, therefore, of the utmost importance for our countries, for their economic and commercial prosperity, that a neutral ground be found, such as is afforded by the Institute, in which it is possible for us not only to get in touch with those countries which determine freight rates, but where we may find some protection for our interests which are at stake. I deem it proper to make this statement so that the merchant marine countries may take into due consideration that situation of those nations which are subject to them for ocean carriage. These nations are of great importance to the merchant marine countries, as it is they who supply the goods to be carried, and as they also largely supply Europe with her foodstuffs and with the raw material for her factories. Consequently, although I have not received direct instructions on this head, I am interpreting faithfully the economic policy to which my government constantly adheres when I give my full support to the proposal which has been brought before the Permanent Committee by the Congress of the United States.

Mr. Pinero Sorondo (*delegate of Argentine*). First of all, I wish to congratulate Mr. Lubin on the fact that, thanks to his efforts, this important question has been brought before us by the Congress of the United States. It is a question of exceptional importance for the Argentine, which has not got a merchant marine, and which



now finds itself compelled to pay enormous freight rates in order to export its products, freight rates which amount in certain cases to fully half the value of the product.

Mr. Rovira (*delegate of Uruguay*). I entirely agree with the remarks which have just been made by the delegate of Argentine, and which hold good for the country which I represent. The resolution passed by Congress has my hearty support.

The President. I put to the vote the motion submitted by Mr. Lubin that the proposal relative to ocean freight rates, contained in the resolutions passed by the Congress of the United States, be made part of the program of the next General Assembly of the Institute.

*The motion was carried unanimously.*

### **Policy of England in Regard to Ocean Transportation.**

On November 30, 1906, a Royal Parliamentary Commission was appointed "to inquire into the operation of Shipping 'Rings' or Conferences generally, and more especially into the system of deferred rebates, and to report whether such operations have caused, or are likely to cause injury to British or Colonial trade, and, if so, what remedial action, if any, should be taken by legislation or otherwise".

The proceedings of the Commission are contained in five volumes, published by the English Government in 1909.

The Commission, in its Report, attributed the following advantages to the Shipping Conference and Deferred Rebate System :

1. Improvements by :

- (a) the institution and maintenance of regular sailings and stable rates of freight ;
- (b) the provision of steamers of high class and speed.

2. Economy in cost of service.

3. More economic distribution of cost of service.

4. The maintenance of equal rates from the United Kingdom and the Continent.

5. Uniform rates of freight to all shippers, large or small.

6. No carriage on ship's account.

The recommendations of the Commission, in brief, were that the shippers and merchants should unite by forming associations which could negotiate with the conferences with greater effect when controversies arose, and if an agreement was not arrived at, the matter could be referred to the Board of Trade for arbitration.

No legislation was enacted by Parliament.

## **INLAND POLICY OF DIFFERENT COUNTRIES.**

### **England.**

#### **I.**

**Att'y Gen'l of Commonwealth of Australia v. Adelaide Steamship Co., Ltd and others, L. R. (1913) App. Cas. 781.**

This case was decided by the Privy Council on July 25, 1913 and involved the construction of the Act passed by the Australian Legislature in 1906 for the preservation of Australian industries and for the repression of destructive monopolies. The Privy Council reviews the common law and public policy of England on the subject of monopolies and contracts in restraint of trade down to the time the Act was passed, in order to properly interpret the meaning of the words "monopoly," "destructive monopoly" and "detriment to the public" contained in the Act.

The appeal was heard before the Lord Chancellor (Viscount Haldane) and Lords Shaw, Moulton and Parker, the opinion of the Privy Council being delivered by Lord Parker, and concurred in by the other members of the court.

The case was an important one, the argument before the Privy Council having lasted 12 days, the original trial in Australia 73 days and the appeal to the High Court of Australia more than a month (29 Times Law Reports 743).

Lord Parker, in delivering the judgment of the Privy Council, says:

"The Act of 1906 was a new departure in legislation and its true construction may be a matter of far-reaching economic importance. Their Lordships propose to consider its provisions with some particularity. Before doing so, however, it will be convenient, having regard to the arguments both here and in the Courts below, to refer to the law as it existed prior to and at the passing of the Act in relation to monopolies and contracts in restraint of trade " (p. 793).

**Common Law Right of Freedom of Trade, and its Limitations where Just Cause or Excuse for Interference Exists.**

"At common law every member of the community is entitled to carry on any trade or business he chooses and in such manner as he thinks most desirable in his own interests, and inasmuch as every right connotes an obligation no one can lawfully interfere with another in the free exercise of his trade or business unless there exist some just cause or excuse for such interference " (p. 793).

**Just Cause or Excuse for Interference: (1) Where Acts done with a Single View of the Doer's own Interests. (2) Monopoly Grants from Crown. (3) Contracts in Restraint of Trade.**

"Just cause or excuse for interference with another's trade or business may sometimes be found in the fact that the acts complained of as an interference have all

been done in the bona fide exercise of the doer's own trade or business and with a single view to his own interests (the *Mogul Steamship Case*, 23 Q. B. D. 598; [1892] A. C. 25). But it may also be found in the existence of some additional or substantive right conferred by letters patent from the Crown or by contract between individuals. In the case of letters patent from the Crown this additional or substantive right is generally described as a monopoly. In the latter case the contract on which the additional or substantive right is founded is generally described as a contract in restraint of trade. Monopolies and contracts in restraint of trade have this in common, that they both, if enforced, involve a derogation from the common law right in virtue of which any member of the community may exercise any trade or business he pleases and in such manner as he thinks best in his own interests" (pp. 793-4).

**Monopoly Grants from Crown Required a Consideration Moving to the Public.—Vexatious Interference with Trade Under Cover of Void Grants.**

"The right of the Crown to grant monopolies is now regulated by the Statute of Monopolies, but it was always strictly limited at common law. A monopoly being a derogation from the common right of freedom of trade could not be granted without consideration moving to the public, just as a toll being a derogation from the public right of passage could not be granted without the like consideration. In the case of new inventions

the consideration was found either in the interest of the public to encourage inventive ingenuity or more probably in the disclosure made to the public of a new and useful article or process. In the case of sole rights of trading with foreign parts it might be found in the interest of the public in new countries being opened to trade. For the validity of every monopoly some consideration moving to the public was necessary. Many of the monopolies purported to be granted by the Tudor or Stuart Sovereigns were bad for want of such consideration, and it was the vexatious interference with trade under cover of these invalid grants which led to the passing of the Statute of Monopolies" (p. 794).

**Evils Formerly Considered as Attending Monopolies.**

"Further, monopolies were in the eyes of the lawyers of that time attended with the following evils:—first, increase in the price of the wares, and secondly, deterioration of the wares themselves, both evils being due to the want of healthy competition (11 Rep., at 86b)" (p. 794).

**Contracts in Restraint of Trade.—The Old Rule and the Modern Rule.**

"Contracts in restraint of trade were subject to somewhat different considerations. There is little doubt that the common law in the earlier stages of its growth treated all such contract as contracts of imperfect obligations, if not void for all purposes; they were said to be against public policy in the sense that it was

deemed impolitic to enforce them and not because every such contract must necessarily operate to the public injury. The old common law rule against enforcing such contracts has, however, been relaxed in more recent times. Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have his freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits" (pp. 794-5).

**The Modern Rule.—The Nordenfelt Case.**

"The existing law on the point is laid down in the case of *Nordenfelt v. Maxim Nordenfelt Co.* ([1894] A. C. 535). For a contract in restraint of trade to be enforceable in a Court of Law or Equity, the restraint, whether it be a partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindall, *C. J.*, in *Horner v. Graves* [1831], 7 Bing. 735) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not

aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public" (p. 795).

**Term "Monopoly" as Popularly Used Equivalent to "Pernicious Monopoly."**

"Lindley and Bowen, *L. J.*, had suggested in the Court below [in the Nordenfelt Case] that though a restraint might be reasonable as between the parties to the contract it might be unenforceable because of the "law which forbids monopolies", or because it was calculated to create "a pernicious monopoly", and there is a similar suggestion by Lindley, *L. J.*, in *Underwood v. Barber* [1899] 1 Ch. 300). The term monopoly cannot be here used in its proper signification of a right granted by the Crown, nor can the expression "the law which forbids monopolies" refer to any common law or statutory rule limiting the Crown's prerogative in this respect. The learned Lords Justices are contemplating a state of circumstances in which some trade or industry has passed or is likely to pass into the hands or under the control of a single individual or groups of individuals, and are indicating that if a restraint on trade is likely to produce this result, it may on grounds of public policy be unenforceable however reasonable in the interests of the parties to the contract. Such a state of circumstances may, by eliminating competition, entail the evils thought to be incident to monopoly rights granted



by the Crown, and may therefore in a popular sense be called a monopoly. It is so called by Farwell, *L. J.*, in the case of the *North Western Salt Co. v. the Electrolytic Alkali Co.* (107 L. T. 439) now under appeal to the House of Lords" (since reversed, see case II, *infra*).

**Chief Evil Entailed by Monopoly was Rise in Prices and Influenced Courts in their Attitude towards Contracts in Restraint of Trade.**

"The chief evil thought to be entailed by a monopoly, whether in its strict or popular sense, was the rise in prices which such monopoly might entail. The idea that the public are injuriously affected by high prices has played no inconsiderable part in our legal history. It led, no doubt, to the enactment of most, if not all, of the penal statutes repealed by 12 Geo. 3, c. 71. It also lay at the root of the common law offence of engrossing, which, according to Hawkins' Pleas of the Crown, vol. ii., book 1, ch. 79, consisted in buying up large quantities of wares with intent to resell at unreasonable prices. It influenced the Courts in their attitude towards contracts in restraint of trade" (p. 796).

**Pernicious Monopoly, Calculated to Enhance Prices to an Unreasonable Extent.**

"Although, therefore, the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be un-

reasonable in the interests of the public if calculated to produce that state of things which is referred to by Lindley and Bowen, *L. JJ.*, as a pernicious monopoly, that is to say, a monopoly calculating to enhance prices to an unreasonable extent" (p. 796).

**Common Law Offence of Engrossing Not Abolished in Australia.—Effect of Protective Tariff.**

"In this connexion it should be noticed that the Act of 7 and 8 Vict. c. 24, which abolished the common law offence of engrossing, does not apply to the States of the Commonwealth, and that monopolies in the popular sense of the word are more likely to arise, and, if they do arise, are more likely to lead to prices being unreasonably enhanced in countries where a protective tariff prevails than in countries where there is no such tariff" (p. 796).

**Burden of Establishing a Pernicious Monopoly No Light One Where Court is Satisfied Restraint is Reasonable as Between the Parties.**

"It is, however, in their Lordships' opinion, clear that the onus of shewing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties the onus will be no light one" (pp. 796-7).

**Question One of Public Policy.**

“ Further, it must be remembered that the question whether restraint of trade is reasonable either in the interest of the parties or in the interest of the public is a question for the Court, to be determined after construing the contract and considering the circumstances existing when it was made. It is really a question of public policy and not a question of fact upon which evidence of the actual or probable consequences, if the contract be carried into effect, is admissible ” (p. 797).

**Contracts or Combinations in Restraint of Trade Never an Offence at Common Law Unless Amounting to a Criminal Conspiracy.**

“ It is only necessary to add that no contract was ever an offence at common law merely because it was in restraint of trade. The parties to such a contract, even if unenforceable, were always at liberty to act on it in the manner agreed. Similarly combinations, not amounting to contracts, in restraint of trade were never unlawful at common law. To make any such contract or combination unlawful it must amount to a criminal conspiracy, and the essence of a criminal conspiracy is a contract or combination to do something unlawful, or something lawful by unlawful means ” (p. 797).

**Right of Combining in a Common Course of Action Legal if with a Single View to the Interests of Combining Parties and not with a View to Injure the Public.**

“ The right of the individual to carry on his trade or business in the manner he considers best in his own

interests involves the right of combining with others in a common course of action, provided such common course of action is undertaken with a single view to the interests of the combining parties and not with a view to injure others (the *Mogul Steamship Case*, 23 Q. B. D 598; [1892] A. C. 25).

"Such having been the state of the law when the Act of 1906 was passed, their Lordships will proceed to consider the various provisions of that Act and its proper interpretation" (p. 797).

#### **Provisions of the Australian Act.**

"The full title of the Act is 'An Act for the Preservation of Australian Industries and for the Repression of Destructive Monopolies,' and Part II., comprising sections 4 to 14, inclusive, is entitled 'Repression of Monopolies.'"

Sect. 4 provides that any person who either as principal or agent makes or enters into any contract, or is or continues to be a member of, or engages in any combination in relation to, trade or commerce among the States of the Commonwealth (a) with intent to restrain trade or commerce to the detriment of the public, or (b) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers, is guilty of an offence the penalty for which is fixed at 500 l.

Sect. 6 defines unfair competition as "unfair under the circumstances," and specifies certain cases in which the competition is to be deemed to be unfair unless the contrary be proved.

Sect. 7 provides that any person who monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any part of the trade or commerce among the States with intent to control, ~~to the detriment of the public~~, the supply or price of any service, merchandise, or commodity, is guilty of an offence the penalty of which is fixed at 500 l.

Sect. 9 provides that whoever aids, abets, counsels, or procures, or by act or omission is in any way directly or indirectly knowingly concerned in or privy to an offence under S. 4 or S. 7 shall be deemed to have committed the offence and be subject to a penalty of 500 l.

Sect. 10 of the Act enables the Attorney-General of the Commonwealth to institute proceedings for an injunction restraining the carrying out of any contract or combination which is, in fact, in restraint of trade or commerce ~~to the detriment of the public~~, or is, in fact, destructive or injurious by means of unfair competition to any such Australian industry as mentioned in S. 7.

The amending Act No. 5 of 1908 contains a section, which as amended by the amending Act No. 26 of 1909, provides that in any prosecution for an offence

against ss. 4, 7, or 9 of the Act of 1906 the averments of the prosecutor contained in the information, declaration, or claim shall be deemed to be proved in the absence of proof to the contrary, but so that the averment of intent shall not be deemed sufficient to prove such intent" (pp. 797-8).

**"Destructive Monopoly" in Australian Act Equivalent to "Pernicious Monopoly."**

"It is in their Lordships' opinion quite clear that the term 'monopolies' and 'monopolize' as used in the Act of 1906 do not refer to a monopoly in the strict legal sense, but in the more popular sense in which Lindley and Bowen, *L. JJ.*, used the term 'monopoly' in the dicta above mentioned. 'Destructive monopoly' is equivalent to 'pernicious monopoly' as used by the learned Lords Justices, and, no doubt, undue enhancement of the prices of goods or services is contemplated as one of the evils which may render a monopoly in the popular sense destructive or pernicious, it being assumed that such enhancement is to the public injury or detriment. Similarly there can be little doubt that one of the ways in which a restraint of trade might in the view of the Commonwealth Legislature be detrimental to the public was by its creating a pernicious monopoly in this popular sense of the word. There may, of course, be other ways in which a monopoly or restraint of

trade may enure to the public detriment, but undue enhancement of prices must certainly be one" (pp. 797-8).

\* \* \* \* \*

**"Detriment to Public" in Australian Act Refers to Producing and Distributing Public as well as Consuming Public.**

"It was also strongly urged that in the term 'detriment to the public' the public means the consuming public, and that the Legislature was not contemplating the interest of any persons engaged in the production or distribution of articles of consumption. Their Lordships do not take this view, but the matter is really of little importance, for in considering the interests of consumers it is impossible to disregard the interests of those who are engaged in such production and distribution. It can never be in the interests of the consumers that any article of consumption should cease to be produced and distributed, as it certainly would be unless those engaged in its production or distribution obtained a fair remuneration for the capital employed and the labour expended" (p. 801).

\* \* \* \* \*

**Solidarity of Interest Between All Members of the Public, Producers as Well as Consumers.**

"It can never, in their Lordships' opinion, be of real benefit to the consumers of coal that colliery proprietors should carry on their business at a

loss, or that any profit they make should depend on the miners' wages being reduced to a minimum. Where these conditions prevail, the less remunerative collieries will be closed down, there will be great loss of capital, miners will be thrown out of employment, less coal will be produced, and prices will consequently rise until it becomes possible to reopen the closed collieries or open other seams. The consumers of coal will lose in the long run if the colliery proprietors do not make fair profits or the miners do not receive fair wages. There is in this respect a solidarity of interest between all members of the public " (p. 809).

**Mere Intention to Raise Prices not Sufficient to Prove Intention to Injure the Public.—Intent to Charge Excessive or Unreasonable Prices Must Be Apparent.**

"The Crown, therefore, cannot, in their Lordships' opinion, rely on the mere intention to raise prices as proving an intention to injure the public. To prove an intention to injure the public by raising prices the intention to charge excessive or unreasonable prices must be apparent " (pp. 809-10).

\* \* \* \* \*

**Privy Counsel Refers to Decision of U. S. Supreme Court in Standard Oil Co. Case.**

"In the argument upon the true construction of the Act of 1906 considerable stress was laid on the cases decided by the Supreme Court of the United States under the analogous statute known as the Sherman Act, and in particular on the case of *Standard Oil Co. of*



*New Jersey v. United States* (221 U. S. 1). Although the judgments in this case are valuable for the light they throw on the development of the common law touching monopolies and contracts in restraint of trade, their Lordships do not think that the decisions themselves are of any real assistance in the present case. The Sherman Act, construed strictly, makes every contract or combination in restraint of trade and every monopoly or attempt to monopolize a statutory misdemeanor **irrespective of any sinister intention on the part of the accused and irrespective of any detriment to the public.** The actual decision is that contracts in restraint of trade which are enforceable at common law are impliedly excepted from the express provisions of the Act. The enforceability of the contract becomes in this way the test of its legality. There is, however, no justification for applying a similar test in the case of an Act which, like the Act of 1906, only deals with contracts or combinations or monopolies or attempts to monopolize which involve detriment to the public and in which a sinister intention is of the essence of the offence" (p. 801).

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The law and policy of England and Australia as declared by the House of Lords, and that of the United States as declared by this Court, do not, however, appear to be very different.

**Standard Oil Co. v. U. S. (1910) 221 U. S. 1.**

"Without going into detail and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were **unreasonably** restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy" (p. 28),

\* \* \* \* \*

"The statute \* \* \* evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce, from being restrained by methods, whether old or new, which

would constitute an interference that is an undue restraint" (pp. 59-60).

**U. S. v. American Tobacco Co. (1910) 221 U. S. 106.**

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* [221 U. S. p. 1], that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplished such purpose" (p. 179).

## II.

**The Northwestern Salt Co., Ltd. v. The Electrolytic Alkali Co., Ltd. L. R. (1914) App. Cas. 461.**

This case was decided by the House of Lords on February 12th, 1914, the same Judges composing the

Court as in the previous case, excepting that Lord Sumner sat in the place of Lord Shaw.

The plaintiff company was a combination of salt manufacturers formed for the purpose of regulating supply and keeping up prices, and it had the practical control of the inland salt market.

The Lord Chancellor says:

" Unquestionably the combination in question was one, the purpose of which was to regulate supply and keep up prices. But an ill-regulated supply and unremunerative prices might in point of fact be disadvantageous to the public. Such a state of things might, if it was not controlled, drive manufacturers out of business, or lower wages, and so cause unemployment and labour disturbance. It must always be a question of circumstances whether a combination of manufacturers in a particular trade was an evil from a public point of view. The same thing was true of a supposed monopoly " (p. 469).

\* \* \* \* \*

" It may be, for all that appears, that agreements of this kind were the only effective method of preventing domestic competition from being carried to a length which would ultimately prove not merely ruinous to the parties themselves, but injurious to the public, even outside that portion of it which was dependent on the prosperity of the salt manufacturing industry " (p. 471).

4  
7

Lord Parker says:

" The competition between salt producers within the area covered by the agreement of September 11, 1906, either *inter se* or with salt producers outside of this area may have been so drastic that some combination limiting output and regulating competition within the area so as to secure reasonable prices may have been necessary, not only in the interests of the salt producers themselves, but in the interest of the public generally, for it cannot be to the public advantage that the trade of a large area should be ruined by cut-throat competition " (pp. 479-81).

### **Germany.**

Agreement AA is valid under the laws of Germany. This was testified to by Dr. Schnitzler, a competent expert on the German Law, who shows that the law of that country does not favor unrestricted competition and refers to numerous decisions of the Imperial Court of Germany on the subject (Test'y, vol. 3, fols. 5294-5300, 5305-6; Exhibits, vol. 10, p. 492 *et seq.*).

The following extracts from the decisions of the Imperial Court show the policy of that country in regard to unrestricted competition:

**Decision in the Case of the German Booksellers' Association of Leipzig—June 25, 1890 (Record, vol. 10, p. 4952).**

In this case, the Imperial Court, in recognizing that the purpose of the association of bookdealers in

regard to rebates was lawful and justified by the historical development of the book trade in Germany, says:

“In the first place, it seems in point to deal with certain allegations made on behalf of the plaintiff according to which it would appear that the very object of the association, consisting in the imposition on all members of the trade of fixed rules as to the rebate to be allowed to customers, was in itself an unlawful interference with the free formation of prices to which the customers were entitled, as well as a restriction on the freedom of trade, and therefore constituted a violation of public order and was an act ‘*contra bonos mores*,’ and that the Association was in the nature of a ‘ring.’ In answer to these allegations it is necessary to point out that they might be relevant if there had been an association of persons, who, for their speculative purposes, had as their object the command of the market for a particular kind of goods and the hemming in of the free action of economic forces, which might operate against such purposes. But such combinations must be kept entirely apart from the associations of persons in the same trade, who, in good faith, co-operate for the purpose of preserving the vitality of such trade, by preventing the depreciation of the products of such trade, and the other disadvantages arising from mutual under-bidding. It does not follow from the principle of the freedom of trade that the free play of economic forces is to be unassailable, to the extent of making it unlawful for traders to attempt

any regulation of the operation of these forces by means of associated self-help, or to restrain each other from acts deemed to be harmful to the common cause."

**Decision in the Case of the Saxon Wood Pulp Manufacturers' Syndicate—Feb. 7, 1897 (Record, vol. 10, p. 4955).**

The Imperial Court says:

"The association now suing, as is expressly stated in the articles of association and not denied by the parties, has been organized to prevent, in the future, destructive competition between the Saxon Wood Pulp Manufacturers and to make possible the obtaining of higher prices than could be obtained from unrestricted competition. Regarding the question whether a combination pursuing such objects violates the principle of freedom of trade expressed in the Trade Law, two points of view are to be considered: *First*, whether, by a combination of trade people for the purpose of maintaining certain minimum prices for their products, the intentions of the legislator, in so far as he desires to further the interests of the community by liberty of trade, are not militated against in an inadmissible manner; *Second*, whether by agreements of the kind in question, the individual freedom of a person is limited in a manner violating the intention of the legislator.

"The first question has repeatedly been answered in the affirmative, especially outside of Germany (citing text-writers), but, on the other hand, the following must be considered.

"If in a given trade the prices of the manufactures are sinking too low, and if thereby the profitable carrying on of the trade is prevented or endangered, then the crisis thereby created is not only pernicious to the individual, but also to the economical status of the people in general, and it is therefore in the interests of the community that prices in a given trade shall not permanently be inadequately low. The legislatures accordingly have often, and also recently, attempted to increase the prices of certain productions by the introduction of protective tariffs. Therefore, it cannot be stated unqualifiedly and generally, that it is contrary to the interests of the community, if manufacturers in a particular trade combine in order to prevent underbidding and the sinking of the prices of their product, or to moderate the same. If prices in fact are continuously too low, so as to threaten the manufacturers with economical ruin, their combination is not only a justified exercise of their right of self-preservation, but also a measure serving the interests of the community, and therefore, from different quarters, the formation of syndicates and cartels of the kind in question have been referred to as a means, which, if properly applied, is especially suitable to be of benefit to the entire community, by preventing uneconomical and wasteful overproduction and the catastrophies resulting therefrom (citing text-writers).

"In accordance therewith, it has been held repeatedly in the past by German and other courts that it does not violate the principle of



freedom of trade, so far as the same is intended to protect the interests of the community against the self interest of the individual, if people in the same trade combine together to pursue, in good faith, the purpose of keeping a certain trade in a condition to live, by protecting their products against their becoming valueless, and the other disadvantages which result from underbidding by individuals (citing various decisions of state courts of appeal (Oberlandesgerichts), and the decision by the Imperial Court of June 25, 1890, vol. 28, p. 238).

"Agreements of the kind in question can, therefore, from the standpoint of the public interest protecting the freedom of trade, only be objected to, if in a given case objections arise on account of special circumstances, particularly if the agreement is evidently intended to create an actual monopoly and the extortionate exploitation of the consumers or if such results will in fact be produced by the agreements and manipulations made.

"As far as concerns the second of the questions raised above, the provision of the Trade Law, by which there is guaranteed to every individual the right to carry on his business at his pleasure, in so far as the laws do not specially prescribe or admit of exceptions and restrictions, cannot be interpreted to mean that the individual may not by contract subject himself to any restriction regarding the time, place or manner of the exercise of his trade. That is not the meaning of Paragraph 1 of the Trade Law has been constantly held by the Imperial Court, by

answering the question, whether agreements prohibiting competition can be legally entered into, in the affirmative, with the restriction that such agreements can only limit the freedom of trade of the individual but not destroy the same forever in all or certain directions.

"The restrictions to which in the case at bar the defendant submitted himself by joining in the agreement of March 22, 1893, are, neither regarding their extent nor regarding the time for which they were entered into, so far-reaching that according to the principles just developed, a restriction limiting the individual freedom of trade in an inadmissible manner could be spelt out therefrom."

This view has never been departed from by the Imperial Court, as shown by its later decisions (Test'y, fol. 5306; Exhibits, pp. 4965, 4990, 4995, 5000).

The American Ambassador at Berlin, in his report to the State Department in reply to the inquiries made by the Alexander Committee, says:

"Although I have been unable to obtain any tangible evidence showing that the German steamship lines have entered into any formal agreement in the nature of a trust, it is quite evident that they are working harmoniously together and maintaining scheduled rates, and there is good reason to believe that this is done with the tacit approval of the Government, whose general policy seems to be to encourage agreements, within reasonable limits, between

manufacturers, miners, shippers, and other large employers of labor which guarantee stability of prices and rates that will enable them to pay good wages to the men, insure the maintenance of plants at higher standard, and the guaranty of a fair return upon the capital invested" (Vol. 3 of Proceedings before Alexander Committee, p. 47).

The American Consul-General, at Hamburg, in a similar report, says :

"The agreement of various kinds to which German steamship owners are parties are numerous and their existence is a matter of common knowledge, although the terms of the contracts are not disclosed to the public. These agreements are permitted under German law; and, indeed, the State-owned German railways, in at least two cases, are parties to such agreements. It is a quite common matter in this country for business firms to pool their interests in various ways, and the German steamship companies merely follow the usual practice" (*Id.*, p. 49).

In the Supreme Court of the United States

OCTOBER TERM, 1911.

NO. 505

THE UNITED STATES OF AMERICA, *Appellant*

HAMBURG-AMERIKANISCHE PACKETFAHRT-AKTIE-  
GESELLSCHAFT *et al.*

NO. 505

HAMBURG-AMERIKANISCHE PACKETFAHRT-AKTIE-  
GESELLSCHAFT *et al.* *Respondents*

THE UNITED STATES OF AMERICA,

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHIEF FOR HAMBURG-AMERIKANISCHE PACKETFAHRT-  
AKTIE-GESELLSCHAFT, THE CANADIAN PACIFIC  
RAILWAY COMPANY AND THE ALAN CO.  
STEAMSHIP COMPANY, *Opp.*

JOHN C. SPOONER,  
CHARLES P. SPOONER,  
JAMES L. BISHOP

*Of Counsel*

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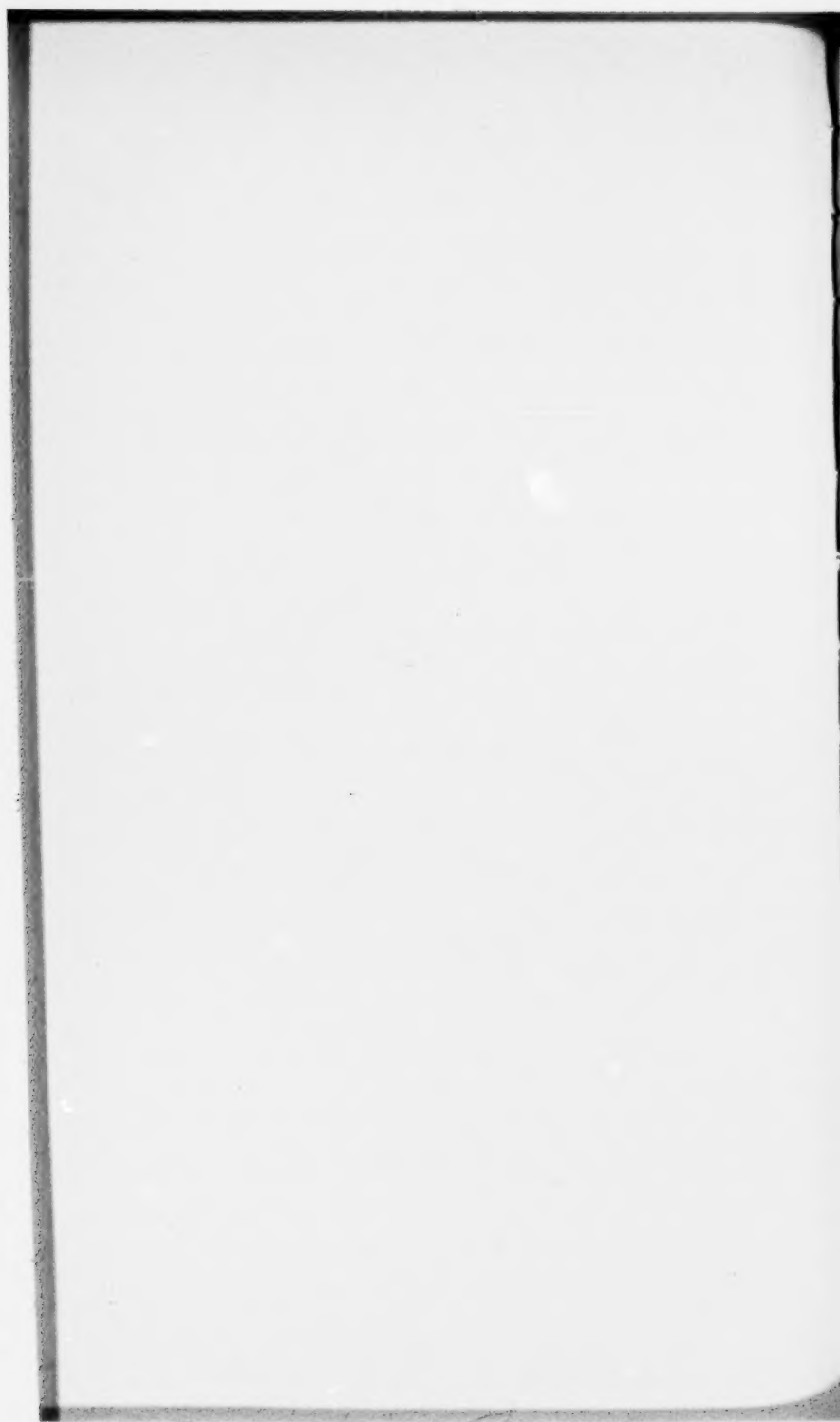
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IN THE  
**Supreme Court of the United States,**

OCTOBER TERM, 1915.

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No. 289.

THE UNITED STATES OF AMERICA, Appellant,  
v.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT *et al.*

---

No. 332.

HAMBURG-AMERIKANISCHE PACKETFAHRT-ACTIEN  
GESELLSCHAFT *et al.*, Appellants,  
v.

THE UNITED STATES OF AMERICA.

---

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE  
SOUTHERN DISTRICT OF NEW YORK.

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**BRIEF FOR DEFENDANTS**

**Hamburg-Amerikanische Packetfahrt-  
Actien Gesellschaft, The Allan Steam-  
ship Company and The Canadian Pa-  
cific Railway Company.**

The case arises under the Sherman Anti-Trust Law.  
This is an appeal by the United States from the

decree of the District Court of the United States for the Southern District of New York, dated November 9th, 1914, dismissing the petition as to the defendants The Allan Line, Bryce J. Allan and The Canadian Pacific Railway Company, and enjoining the other defendants from combining to restrain the business of any owner of a vessel operated in competition with the vessel or vessels of one or other of the defendants by providing, operating or maintaining an extra vessel for the purpose of having it compete with such competing vessel, and dismissing the petition as to all other prayers for relief (Decree, 10 R. 5136). The assignments of errors filed by the United States (10 R. 5140-5144) claim that the Court erred in dismissing the petition as to the defendants named above, and in not granting the prayers of the petition in full as to all the defendants.

There are also cross appeals by the defendants upon the ground that the Court erred in not dismissing the petition as to all the relief prayed for upon the ground that the transportation carried on by defendants between the United States and foreign countries, and the other matters alleged in the petition, are not within the purview of the Sherman Anti-Trust Act, for the reason that the Congress did not intend said act to apply to international commerce, and that the Court erred in not sustaining the defendants' demurrers to the petition upon that ground (14 R. 4).

The defendants filed general demurrers to the petition (10 R. 5103), which were overruled by order of

the Court dated January 5, 1912 (14 R. 12); these defendants thereupon filed separate answers (11 R. 147, 165, 204, 221).

## **The Pleadings.**

### **1. The Petition.**

The petition alleges that the defendants are engaged in foreign trade and commerce as common carriers of passengers and freight, and more particularly of third class or steerage passengers between ports in the United States and abroad; that they are violating the provisions of the Sherman Anti-Trust Law and that this proceeding is instituted to prevent and restrain the carrying out of the agreement, contract, combination and conspiracy in restraint of trade in the carriage of steerage passengers and the attempt to monopolize such trade and commerce as set forth in the petition.

After describing the defendants and the trade and commerce which they conduct, and the trade and commerce which they have attempted to monopolize, the petition sets forth the means alleged to have been employed in accomplishing the unlawful combination, and particularizes them as follows:

#### *The Participation Agreement of February 5, 1908.*

A copy of this agreement is attached to the petition and is known as Agreement AA (11 R. 39).

All the corporate defendants were either original parties to that agreement or have since become parties to it.

The articles of the agreement so far as they are important in this controversy may be summarized as follows:

By Art. 1 it is provided that the companies parties thereto

“guarantee to each other the percental participation as defined in Article 3 of this contract of the entire steerage traffic forwarded by the parties to this contract from all European ports to and via the United States of America and Canada and *vice versa* in vessels owned, leased, chartered or controlled by them without regard to the flag.”

Art. 3 designates the proportions in which the lines are to participate, west bound and east bound, and it is stated that the Allan Line's Canadian service and the Canadian Pacific Railway Co. (Atlantic S.S. lines) are not covered by the contract as far as west bound business is concerned.

Art. 6 provides that any lines whose steerage transportation a year exceeds in point of number the proportions fixed shall pay the compensation price of four pounds for each passenger carried in excess of the established proportion.

Art. 8 provides that accounts shall be prepared by the Secretary and settlements made at the end of each calendar year.

By Art. 9 each line undertakes to arrange its service in such a manner that the number of steeragers

which it actually carries corresponds as nearly as possible with the number allotted to it by the contract.

Art. 10 relates to the statistics to be prepared and furnished to the lines.

Art. 11 provides that in case the results show that any line has exceeded its proportion or remained below its proportion it is bound to adopt measures to bring about a correct adjustment, and shall give notice of such proposed measures to the Secretary. The other lines are entitled to await the result of the measures and

“in so far as they represent 75% of the shares they may direct other and more forcible measures, which can only refer to rates, to be set in motion.”

Art. 12 is as follows:

“No line has the right to alter its steerage and second cabin rates without having previously informed the secretary.”

Art. 14 regulates the commission to be paid to agents out of the gross steerage rates.

Art. 16 *adopts* the following:

“No circulars or publications shall be issued by any line reflecting upon or instituting comparisons with any conference line unfavorable to the latter, and no party hereto shall support any newspaper which may systematically attack any conference line.”

Articles 17 and 18 provide for a deposit of a promissory note by each of the parties, to be considered

liquidated damages and forfeited if the line that made the deposit unduly withdraws from the contract before its expiration or resorts to actions which render the continuance of the contract impossible, and are, therefore, equivalent to a withdrawal, and also the refusal to pay compensation money, or failure to replenish the deposit, or assisting new opposition lines, or starting a line by which the business would be seriously interfered with.

Art. 22 permits other lines to be admitted to the contract and the terms to be altered or amended by unanimous vote.

The agreement also provides for the appointment of a secretary and an arbitrator. It is to continue from March 1, 1908 to February 28, 1911, and thereafter from year to year unless notice is given not later than December 1st.

*Alleged Acts in Pursuance of the Agreement.*

The petition further sets forth certain acts which it is alleged the defendants have performed for the purposes of the unlawful combination and conspiracy, with the result that all free and natural competition between said lines in the establishment of rates and the furnishing of facilities for steorage traffic have been thereby wholly eliminated:

That the individual defendants acting as the agents of the corporations have carried out and executed acts necessary to the accomplishment of the combination

and conspiracy, and particularly in the Southern District of New York:

That at a meeting held on March 25, 1908, the defendants agreed that they would act together to eliminate competition by other lines:

That in the execution of the combination the defendants have employed so-called "fighting steamers":

That they employed such methods to suppress competition by lines of steamers running from New York to Libau in Russia, known as The Russian Volunteer Fleet and the Russian-American Line:

That the Uranium Steamship Company, Ltd., under the name of the Northwest Transport Line has been prevented by these means from obtaining a fair and reasonable share of the traffic and has been forced to carry such as it has secured at a financial loss:

That in pursuance of the combination the defendants have agreed that no one of them shall continue to employ as agent for the sale of tickets over its line any person who shall act as agent for the sale of third class or steerage tickets over any independent line in competition with the defendants' lines:

That the defendants have arbitrarily fixed their rates for steerage transportation so as to bring about the arbitrary division of traffic referred to and to maintain rates at that artificial level at which said traffic will be made to yield the highest net return, and that by such action they are depriving the public of the benefits of the normal division of traffic and the benefit of

the lower scale of rates for such traffic that would normally have resulted from free competition:

That the defendants have been constrained to conduct a steerage business in compliance with the terms of the said contract under duress of loss of membership and the forfeiture of the money deposit.

The petition further alleges as the result of the unlawful contract and practices that the defendants have obtained and attempted to obtain the virtual monopoly of that part of the traffic for transporting steerage passengers between the United States and foreign nations included within the scope of the conspiracy, and that at the date of the filing of the petition upwards of ninety per cent. of the total third class or steerage passenger traffic is carried in ships belonging to the defendants, and upwards of 75% of the total steerage passenger traffic is regulated by means of the contract of February 5, 1908.

#### *The Prayer of the Petition.*

The prayer of the petition is:

That the combination and conspiracy and the contract entered into between the defendants as set forth be declared illegal as in violation of the Sherman Anti-Trust Law, and that injunction issue restraining the defendants from doing any act in pursuance thereof:

That each of the defendants be enjoined from entering or clearing any ship at any port of the United States so long as they continue to operate under the alleged unlawful combination and conspiracy:



That the defendants be enjoined from further agreeing or combining to establish rules and regulations for carrying steerage passengers between the ports of the United States and European ports in restraint of trade:

That they be enjoined from combining to injure or destroy the business of any person or corporation engaged in the business of carrying steerage passengers between the ports of the United States and European ports.

## **2. The Answers.**

The answers of these defendants admit the general averments of the petition respecting the character of the defendants and the business in which they are engaged, but deny the allegations charging that they have been or are engaged in any combination or conspiracy, or that they have entered into any contract to restrain trade and commerce:

They admit that they entered into the participation agreement of February 5, 1908:

They admit that at a meeting held in the City of London on May 25, 1908, it was agreed that one of the lines should when necessary quote low rates in competition with the rates of any outside line:

They deny that the facts are correctly stated in the petition respecting the alleged "fighting steamers" and set out the facts as to the matters referred to in the petition in that behalf.

Answering those portions of the petition referring

to the Russian Volunteer Fleet and the Russian-American Line, the defendants deny that their methods were employed to suppress competition, but allege that they were employed solely to protect their lawful business:

They admit certain facts alleged with regard to the selection of a steamer to meet the competition of the Russian Volunteer Fleet, and they allege that the steerage rates of the Russian Volunteer Fleet and those of the steamer selected to meet their competition were so low that neither the Russian Volunteer Fleet nor any other line could derive any profit therefrom.

Similarly, the defendants deny and specify the facts with regard to the Russian-American Line and the Uranium Steamship Company and the Northwest Transport Line; they justify the action of the defendants with regard to the terms of the employment of agents.

The defendants aver that the effect of the agreement between the defendants is not to destroy competition among the parties, but only to regulate such competition reasonably, so that all steamship companies may exercise a reasonable and beneficial control over the agencies for the sale of steerage tickets and may charge fair, reasonable and stable rates, and thus be able to meet the constant public demand for better ships and better accommodations, without substantial increase of rates, and so that the weaker lines may be able to live and compete for and retain fair shares of such steerage traffic.

The defendants set forth the evils of unregulated

competition in transportation upon the sea and allege that the results of the operations under the agreement are in every respect beneficial.

### **Statement of the Case.**

#### **1. Conferences and Rate Agreements.**

The Government claims that the fixing of rates was the primary purpose of the participation agreement of February 5, 1908, and that this purpose was carried out not only by that agreement but by other agreements and by conferences.

The facts respecting this feature of the case must, therefore, be examined.

Conferences of ship owners are common in all parts of the world and have been for a great many years, certainly as far back as 1868 (13 R. 1408). These conferences have had to do with freight service as well as with passenger service in the various classes. In *U. S. v. The Prince Line* (220 Fed. 230), where a conference agreement was before the Court, it was referred to as

“the well known sort not infrequently found among ocean carriers where two or more ship owners agree together as to the number of vessels they will operate in a particular trade, as to the number of voyages to be made between specified ports, as to the dates of sailing, as to the exchange of freight to be carried when the

vessel of one or another line has her space engaged or it is more convenient to use one vessel instead of another, as to rates of freight, etc."

Such conferences are composed of those interested in particular lines of ocean traffic, thus the North Atlantic Conference is composed of the British lines; the Continental Conference principally of the German lines, the Mediterranean Conference of the Mediterranean lines. These conferences had been in the habit of discussing and determining rates (13 R. 1466).

In 1892 the Continental lines entered into a participation agreement, which is known as the N. D. L. V., a translation of which is found in the record (1 R. 37). This agreement provided for a proportional division of the steerage passenger traffic from the United States and Canada to the European continent north of Cadiz. The parties to it were the Nordd-Deutscher Lloyd, The Hamburg-American, The Red Star Line and The Rotterdam Line. The traffic was distributed in specified proportions between the parties. The agreement contemplated that each line should have the right to fix its own steerage rates, since it provided that no line should alter those rates without previously having notified the secretary (1 R. 23).

After this agreement, as before, steerage rates were fixed by conference or by agreement between ocean carriers engaged in particular lines. Instances of such

agreements are found in the record as follows: Scandinavian and Finnish Business, A. D. 1900, Petitioners' Exhibits 734 (5 R. 2499); 1898, Ex. 738 (5 R. 2537); 1898, Ex. 751 (5 R. 2637); (no date) Ex. 748 (5 R. 2614); British business, 1900, Ex. 736 (5 R. 2514); 1898, Ex. 750 (5 R. 2626); 1898, Ex. 737 (5 R. 2532).

Respecting the agreements cited it is to be observed that the rates were subject to change at any time upon notice by any line considering such change necessary or desirable. In addition to these express agreements, rates were also discussed and determined upon at conferences, but the agreements and conferences did not prevent the recurrence of rate wars, from which great loss and demoralization resulted (Cauty, 12 R. 1091).

In 1908 some of the defendant corporations concluded to enter into an agreement similar to that which had been made by the continental lines in 1892. This resulted in the agreement which is the subject of this action, the particulars of which have been specified above. The essential feature of this agreement was the percental participation of the steerage traffic between the parties, while leaving each of them free to fix its own rates (Art. 12, *supra*, p. 5). The percentages were based on the previous performances of the companies.

After 1908, there were some agreements as to rates between particular lines, and the subject of rates naturally constituted one of the subjects of discussion at

meetings of the participants and through conferences (Straus, 12 R. 762).\*

The right of each line to determine its rates for itself was recognized. Thus, Mr. Winter, for many years connected with the North German Lloyd, and afterwards with the Cunard line, testified as follows:

"Q. Are the lines which are parties to AA precluded from changing their rate? A. No, indeed not.

Q. Is it not a fact that they do change it from time to time? A. Constantly, yes.

Q. Since the making of agreement AA is it a fact or is it not a fact that the rate on the lines parties to that agreement have from time to time fluctuated? A. Decidedly, yes" (13 R. 1755).

Notices of change of rates by some of the lines were sent out from time to time by the secretary (Petr. Ex. 1644, 9 R. 4895), and notices by individual parties of an intention to change their rates were also sent (Petr. Ex. 733, 5 R. 2498). By this means the different parties were kept advised as to what rates were being changed and what methods were being pursued (Winter, 13 R. 1739).

*The object of the participation agreement is to distribute the traffic and thus to stabilize rates at a reasonable figure.*

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\* In order to avoid confusion it should be noted that many of the rate agreements which are made a part of the record by the petitioner relate to the first and second cabin business, and some of them, as pointed out before, were made long before AA and are superseded by it.

The letters referred to in the Petitioner's brief (7 R. 3305, 8 R. 3918 and 6 R. 3914), the two first of which are notices of changes of Continental rates and the third of Scandinavian rates, if they can be regarded as having been acquiesced in by the parties to whom they were addressed and hence as implied agreements, were still subject to the right of any party to the AA agreement to change its rates as provided by AA 14 which was the fundamental law for the parties to that agreement. The record does not disclose the schedule of rates referred to in the petitioner's brief.

The authority given to 75% of the traffic by Art. 11 to affect the rates of those whose proportion had changed was for a special purpose of a temporary character.

This, so far from destroying competition, protected the weaker lines and at the same time furnished an inducement to all the lines to improve and increase their facilities and service to the end of earning better rates (Ismay, 12 R. 1013 *et seq.*; Straus, 11 R. 776).

## **2. Other Matters Alleged by the Government as Showing Restraint of Trade.**

### **(a) *The Agency Agreement.***

Article 14 of the AA Agreement fixes the maximum sum to be paid to agents. At a conference held subsequent to the AA agreement (Pet. Ex. 705, 5 R. 2282) the following rule of the Continental Conference (Pet. Ex. 221, R. 227) was adopted:

"Agents are prohibited from booking passengers for any steamer except those of the

lines, members of the Continental, the Mediterranean, and the North Atlantic Passenger Conference, unless conference gives express permission in writing. Agents are prohibited from selling passenger tickets under false representations as to the line or route by which the passenger is to be transported."

This is what is characterized by the Petitioner as "*boycotting*" agents.

It appears that a regulation similar to this was adopted by the North Atlantic Steamer Traffic Conference as far back as 1879 (Richard, 12 R. 930), and that it has always been the rule.

The regulation having been negligently enforced deplorable conditions resulted. These are described at considerable length in the record (Hannah, 13 R. 1451, 1489-91), as follows:

Almost any person could get a commission on a steamship ticket. The result was that a very undesirable class of men went into the emigrant agency business and preyed upon foreigners unfamiliar with the language and surroundings, and also imposed upon and defrauded the companies, while commissions ran to an exorbitant rate (Straus, 12 R. 762).

The Russian Volunteer Fleet, which undertook to establish a line of steamers between Libau in Russia, and New York, and the successor line the Russian East Asiatic Steamship Company, also known as the Russian-American Company, represented by Richards, were anxious to have their tickets sold through the



conference agents in competition with the conference lines, and Mr. Richards insisted that the conference agreement was unfair in the particular noted above but in that respect only (14 R. 827).

Mr. Straus representing the Russian East Asiatic Line testified that the decent respectable agents of the reliable companies were all conference agents, and that the Russian line would like to have the benefit of that particular agency, and that was the reason they asked for admission to the conference (12 R. 765).

It is alleged in the Petitioner's brief that the conference agents made misrepresentations as to the service of the competing lines (Petr.'s Brief, pp. 30-31). But these statements are, we think, unsupported by the evidence, which as to these matters is mere hearsay and rumor. There is, we submit, no evidence of unfair competition in the matter of the agency agreement, unless it can be derived from the agreement itself, and that presents a question which will be considered later on.

(b) *Fighting Steamers.*

We do not consider it necessary to detail the evidence upon this subject. None of the companies represented by counsel presenting this brief have appealed from the decree of the District Court enjoining the continuance of the methods complained of.

The Canadian Pacific and the Allan Line each withdrew from the agreement under which the

methods criticized were conducted before this suit was brought. The Allan Line joined in May, 1908, and withdrew December 16, 1908 (Hannah, 13 R. 1434). The Canadian Pacific gave notice of withdrawal June 15, 1910 (Kerr, 13 R. 1593) and this became operative by the terms of the agreement in thirty days (5 R. 2285). The petition in this suit was filed January 4, 1911.

(c) *Commercial Allowances.*

An agreement was made between the Western Railroad Association and the Steamship Lines which provided that the railroads should pay a commission allowance of ten per cent. on all west-bound passengers holding inland emigrant rail orders, landing at Ellis Island and ticketed by rail lines at Ellis Island, provided that—effective May 1, 1904—the maximum commission from New York to destination should be \$4, so long as the traffic lines paid their present rates of commission, any change in the latter to likewise change said maximum. The party of the second part, the railroad association, further agreed that it would not pay any commission allowance to any trans-Atlantic steamship line not included in the party of the first part or to any other party or parties on business subject to this agreement (Petn.'s Ex. 60, 1 R. 374).

As to this agreement it is not contended by the Government that there were any unfair methods adopted, unless criticism can properly be made of the

agreement itself. This matter, therefore, presents no question of fact for present consideration.

(d) *The Outside Lines Alleged To Be Affected by Unfair Competition.*

The petition alleges that certain outside lines have been hampered in their business by unfair methods of competition on the part of the defendants, and that in one instance the company was compelled to suspend business.

The particular methods of competition criticised are those referred to above, the so-called "fighting steamers," the restriction on conference agents, and the commercial allowances. With respect to the fighting steamers, in view of the injunction granted by the Court below and the acquiescence of these defendants therein, it is not now considered that this method of competition is involved.

The first outside line respecting which complaint is made is known as the Russian Volunteer Fleet. This was a Russian Government line. Mr. Straus says it belonged to the Government (12 R. 765). Mr. Fourman, who had been connected with the line, testified as follows:

"The officers of the Russian Volunteer Fleet were all of the Russian Navy. The Russian Volunteer Fleet was receiving and is receiving now a subsidy on the other lines. The steamers in time of war are to carry soldiers, ammunition, &c., and were built for that purpose. Now, I stated that the nation owns them, as I said

before the Russian Volunteer Fleet was inaugurated through a popular subscription all through the Empire of Russia, and each state, or as we call it there, Government, subscribed a certain sum of money to the Fleet to build a steamer.

. . . The Government had the management of the Russian Volunteer Fleet in that it managed the affairs of the Russian Volunteer Fleet, took charge of each department, department of war, department of marine and department of navy, etc." (Fourman, 11 R. 600).

It is claimed on behalf of the Government that this line was driven out of business by the methods of the defendants, but there is in evidence a letter from the President of the Company which was published in the "Shipping Illustrated" of New York City, which reads as follows (Deft. Ex. 3, 12 R. 819):

"RUSSIAN VOLUNTEER FLEET,

19 Morskaia, St. Petersburg 12-25,

January 1911, No. 165.

EDITOR OF THE SHIPPING ILLUSTRATED,

22 Thames Street, New York.

DEAR SIR:

In your issue of the 7th inst. we find in an article headed 'Action against the Trans-Atlantic Pool' mention made of the Russian Volunteer Fleet as 'having been driven out of business as a result of the practices adopted by the pool.'

We beg to say that the above statement, as far as it concerns the Volunteer Fleet, is not

correct, as the Committee of the Russian Volunteer Fleet had decided to suspend their Libau-New York line for reasons of their own that had nothing in common with the attitude taken by the pool.

Believe us, dear sir,

Yours faithfully,

(Signed) A. RADLOFF, President."

It is true that this letter is evidence of a hearsay character, but we think that it is entitled to at least as much weight as a large part of the evidence submitted on the part of the Government.

The Line did not go out of business, but it did abandon its trade from Libau to New York and confined itself to the Asiatic business in which it had been formerly engaged (Petitioner's Exhibit 1027, 7 R. 3473).

There was another line which also ran from Libau to the United States, known as the Russian-East Asiatic Company.

This company applied for admission to the participation agreement within ten or eleven months after they started to run, and were promptly admitted (Straus, 12 R. 738). They complain of no unfair competition in any other particular, except that they were not permitted to employ the conference agents as their agents, though they were willing to pay them more commission than they would give their own agents, in order to induce them to put business over their line (Richard, 12 R. 827).

The New York and Continental Line, subsequently

known as the Northwest Transport Company, and later as the Uranium Line (Nyland, 11 R. 458) was also engaged in the Russian trade, and in April, 1908, it instituted a service between Rotterdam and New York, which was and is in direct competition with the Holland-American. It is claimed by the defendants that the competition by this line was in many respects particularly unfair; that they concealed the rates at which they were actually carrying passengers, publishing one rate and actually conveying at a different and lower rate (Nyland, 11 R. 510); that they offered commissions to agents much higher than those given by the conference, and it seems to have been the conviction on the part of the defendants that this line of steamers was in fact owned and operated by the Canadian Northern Railway Company, although there is much mystery about the actual ownership (Richard, 12 R. 822; Cauty, 12 R. 1094, 1095; Thomas, 13 R. 1694, 1697). Whoever the interests were that were running the line they did not seem to care very much whether they made a profit or not, they seemed to have inexhaustible means at the back of them (Thomas, 13 R. 1698, 1700). The evidence is that the line has not been running at a loss during the last two years (13 R. 1713). In 1909 the Northwest Transport made 21 trips to Rotterdam and carried 3,341 steerage; in 1910 the Uranium, its successor, made 28 trips and carried 10,016 steerage; in 1911 it made 26 trips and carried 13,286 steerage (11 R. 597). The line is still in active operation and it is evident

that whatever the competition by the conference lines may have been the Uranium was not only able to survive, but it increased its business.

### **3. Affirmative Statements of the Answers.**

The defendants in their answers allege affirmatively that their business has been conducted not for the purpose of driving others out of business, but so far as they have underbid their ordinary rates it was for the purpose of meeting rates offered by their competitors. They allege that the system of transacting business under the participation agreement is highly beneficial to the public interest in securing stability of rates, uniformity of sailing and avoiding the uncertainties and losses which necessarily result from commercial warfare; that the regulations which they have established are reasonable and fair; that the rates have not been exorbitant but, on the contrary, have been reasonable and have not been increased proportionately to the increase in the cost of conducting the business and the service rendered. We contend that the evidence overwhelmingly establishes these facts. These matters are necessarily dealt with in the argument hereafter submitted.

## POINT I.

**The anti-trust Provisions of the Wilson Tariff Act of 1894 are inconsistent with the theory that the Sherman Act was intended to extend to commerce on the high seas between the United States and foreign nations.**

That the words "trade or commerce among the several States, or with foreign nations," used in the Interstate Commerce Act of 1887 and in the Anti-Trust Act of July 2d, 1890, were used by the Congress in the same sense as being limited in their scope and operation to the territory of the United States, is made perfectly plain by subsequent legislation upon the same subject as that covered by the Act of July 2d, 1890.

Section 73 of what is known as the Wilson Tariff Act, 28 Statutes at Large, Ch. 349, page 570, provides as follows:

"SEC. 73. That every combination conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void, when the same is made by or between two or more persons or corporations either of whom is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the



market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and, on conviction thereof in any part of the United States, such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months."

The subsequent sections, numbered 74, 75, 76 and 77, in respect of the jurisdiction of courts and the exercise thereof, proceedings summoning additional parties, forfeiture, etc., of property affected by trust, and suits by parties injured and damages, are substantially copied from the Act of July 2d, 1890.

If the Act of July 2d, 1890, was understood by the Congress to exhaust the Federal power, by way of regulating the foreign commerce of the United States, this Act was utterly unnecessary, since, beyond question, such combinations could have been punished without this additional legislation.

The Sections referred to above were offered by

Senator Morgan, of Alabama, as amendments to the Tariff Bill. While it is the rule that "there is general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body,"—a rule more honored in its breach than in its observance, this rule has not been regarded as including the utterances of a member who introduced a measure, or an amendment, in exposition of its purpose, or the utterances of a member who reported a measure from a Committee, in explanation thereof.

Senator Morgan stated the object of his amendment to be:

"The repression of trusts, as they are called, in respect of the importation of goods from foreign countries" (Page 530, Bills and Debates Relating to Trusts, 50th Congress to 57th Congress, 1st Session inclusive, prepared by direction of the Attorney General, Washington, Government Printing Office, 1903).

Senator Morgan also said, at page 532, *ib.*:

"We have enacted heretofore the Act of 1890 in regard to Interstate trusts." \* \* \*

By the use of this language, he meant, of course, Interstate and foreign commerce within our territory. No one understood better than he that the operation of the Act of July 2, 1890, was limited to foreign commerce within the territory of the United States.

Senator Voorhees, then Chairman of the Finance Committee of the Senate, said (*ib.*, p. 535):

"Mr. President, this measure has my full approbation. The Senator from Alabama submitted it to me some time ago and again still more recently. \* \* \*

"I appreciate entirely the wisdom and patriotism of the Senator from Delaware. A reference of such a measure to the Judiciary Committee is apt and proper under ordinary circumstances, and in its very nature it goes to that Committee properly. Yet, if the Senate can come to the conclusion which I have reached, and which the Senator from Alabama and others who have carefully examined this measure have reached, and can pass upon it and adopt it now, I believe it would be a measure of great wisdom and of great safety to the American people." \* \* \*

Senator Voorhees also said, at page 536 (*ib.*):

"There are variances of opinion in that committee as to whether it ought to be brought forward now or in some other shape and at some other time. As to the provisions themselves, I know no difference of opinion in the committee over which I have the honor to preside. This much, I think, it is due to the occasion to say."

Senator Palmer, of Illinois (p. 537, *ib.*), himself a lawyer of great experience and ability, said:

"Mr. President, I beg to say that so far as I understand the amendment of the Senator

from Alabama, I favor it; but I cannot forget the fact that this is a proposition to *add a most important chapter to the criminal code of the United States.* \* \* \*” (Italics ours.)

Senator Dolph, of Oregon, an eminent lawyer, said (p. 537, *ib.*):

“I desire to vote to put this amendment on the bill. I shall vote against its reference to the Judiciary Committee. I am afraid it will not accomplish very much if enacted into a law, but it is a move in the right direction. As has been said, it cannot hurt any innocent man.”

The amendment was agreed to in the Senate, because of its importance, without even a call of the roll, was agreed to by the House of Representatives and became a part of the law. This Act was carefully preserved by what is known as the Dingley Tariff Act, U. S. Statutes at Large, Volume 30, page 213 (the last provision in the Act), as follows:

“*And provided further,* That nothing in this Act shall be construed to repeal or in any manner affect the sections numbered seventy-three, seventy-four, seventy-five, seventy-six, and seventy-seven of an Act entitled ‘An Act to reduce taxation, to provide revenue for the Government, and for other purposes,’ which became a law on the twenty-eighth day of August, eighteen hundred and ninety-four.”

And it was not repealed by the later Tariff Act. It seems not possible to account for the enact-

ment of this law upon any other hypothesis than that it was the understanding of Congress that the ground was not covered by the Act of July 2d, 1890. Yet it is certain from its language and from the decisions interpreting it, that that Act embraced every contract and combination, in form of trust or *otherwise*, or conspiracy in restraint of trade or commerce among the several States and with foreign nations, within our territory.

If the Act of July 2nd, 1890, did not embrace combinations, contracts and conspiracies to restrain trade and commerce in imports, or in respect of articles to be imported into the United States, it can hardly be said that the Congress intended by its provisions, as general and sweeping as they are, to prescribe the rule by which commerce on the high seas with this and other nations shall be governed.

If the offences created by the Act of 1894 were covered by the general language of the Act of July 2, 1890, the Act of 1894, being specific and later, modified the Sherman Act *pro tanto*.

It will be observed that the anti-trust provisions of the Wilson Tariff Act are confined to what may be *imported*. They do not apply to the bringing in of *persons*, whether in the steerage or elsewhere on the ship.

This act was amended to make it apply to both principals and agents by the Act of February 12th, 1913 (37 Stat. Pat. Law, p. 627). It is also referred to as existing in Clayton Law (Act of Oct. 15th, 1914, 38 Stat. 730).

## POINT II.

**The Participation Agreement of February 5, 1908 (AA), does not of itself restrain trade and commerce within the meaning of the Sherman Anti-Trust Law.**

*1. The Terms and Provisions of the Agreement.*

The articles of the agreement are summarized above (pp. 4, 5 and 6). For the present purpose it is necessary to refer to only a few of them. The plan, as exhibited by the agreement, contemplates that carriers engaged in the transportation of emigrants between the United States and Canada and European ports shall participate proportionately in the traffic. The basis of the apportionment is the volume of business of this character previously transacted by the respective companies. The intention concededly was that each company should be limited to the proportion of the whole business allotted to it. In order that no company should exceed its proportion, it is provided that any line exceeding in point of number the proportion fixed shall pay £4 for each passenger in excess of the established proportion. The line exceeding its proportion is bound to adopt measures calculated to bring about a correct adjustment, and lines having seventy-five per cent. of the traffic may direct such measures which can only refer to rates to be set in motion (Art. II, II R. 48). The purpose of this provision is not primarily the compensation, but the measure is adopted as a means to deter

the lines from following a tendency to exceed their proportion (see Commentary to this Act, 11 R. 48).

The parties are at liberty to fix their own rates; that is plainly implied in the provision that "no line has the right to alter its steerage and second cabin rates without having previously informed the secretary (Art. 14).

It is quite obvious that having regard to the provisions of the agreement alone, in operation it can never result in a monopoly either by one of the participants over the others or by all of the participants over outside business.

The manifest purpose was not to defeat or destroy competition, but to regulate it. There is no provision of the agreement, express or implied, by which the participants are to act in concert in raising or lowering rates to meet outside competition. It is true that seventy-five per cent. of the traffic may regulate rates for the purpose of confining each one of the parties to the per cental participation, but this is intended as a temporary expedient for that purpose only. Whatever may have been done by either or all of the parties outside of this agreement which is open to criticism ought not, we submit, to be taken into consideration in passing upon the question whether the agreement, if operated according to its terms, violates the Sherman Law.

The plan, while it does not empower the participants to fix rates, by apportioning traffic, does, to some ex-

tent, have a tendency to lessen the inducement on the part of any one carrier to raise or lower rates.

2. *The Rule of Law to be Applied.*

The purpose of the Sherman Anti-Trust Law was not to render invalid all agreements in restraint of competition, but only those in which the restraint of competition is such as to unduly restrain trade and commerce. This we understand to be an accurate statement of the law as laid down by the late decisions of this Court, beginning with the Standard Oil and American Tobacco cases.

While the agreements between carriers by railroad for fixing and maintaining reasonable rates which were before the Court in *United States v. Trans-Missouri Traffic Freight Association* (166 U. S. 290), and *United States v. Joint Traffic Association* (171 U. S. 505), were condemned and those judgments have not been overruled, yet the broad language employed in the opinions of the Court in those cases, by which all contracts in restraint of trade were condemned and not merely such as are in unreasonable restraint of trade, has been modified by the Court since the decision by the Standard Oil case. In that case the Court said:

"\* \* \* that in so far, however, as by separating the general language used in the opinions in the Freight Association and Joint Traffic cases from the context and the subject and parties with which the cases were concerned, it may be conceived that the language



referred to conflicts with the construction which we give the statute, *they are necessarily now limited and qualified.*" (Italics ours.)

We think that the rule of law which is applicable to the pending case will be clearly presented by an examination of the dissenting opinion of Mr. Justice White in the Trans-Missouri case when compared with the later utterances of the Court. In the former case he says:

"To define, then, the words 'in restraint of trade' as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain. The dilemma which would necessarily arise from defining the words 'contracts in restraint of trade' so as to destroy trade by rendering illegal the contracts upon which trade depends, and yet presupposing that trade would continue and should not be restrained, is shown by an argument advanced, and which has been compelled by the exigency of the premise upon which it is based. Thus, after insisting that the word 'every' is all-embracing, it is said from the necessity of things it will not be held to apply to covenants in restraint of trade which are collateral to a sale of property, because not 'supposed' to be within the letter or spirit of the statute. But how, I submit, can it be held that the words '*every* contract in restraint of trade'

*embrace all* such contracts, and yet at the same time it be said that certain contracts of that nature are not included? The asserted exception not only destroys the rule which is relied on, but it rests upon no foundation of reason."

The same learned judge in the American Tobacco case (221 U. S. 179), said:

"Applying the rule of reason to the construction of the statute, it was held in the Standard Oil case that as the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance."

We think we are justified, therefore, in assuming that if the agreement in question does not operate to the prejudice of the public interest and would have been valid at common law or under the law of this country at the time of the adoption of the Anti-Trust Act, then it is not within the reprobation of the statute.

The interpretation of the statute by the Supreme Court in the Standard Oil and Tobacco Cases is sum-

marized by Mr. Justice Day in *United States v. Union Pacific Railroad Company*, 226 U. S. 61-84, as follows:

"In the recent discussion of the history and meaning of the Act in the Standard Oil and Tobacco Cases, this Court declared that the statute should be given a reasonable construction with a view to reaching those *undue restraints* of interstate trade which are intended to be prohibited and punished; and in those cases it is clearly stated that the decisions in the former cases have been made upon an application of that rule, and there was no suggestion that they had not been correctly decided. In the Tobacco case, after referring to the previous decision in the Standard Oil Case and the decisions in the Trans-Missouri and Joint Traffic Cases, the doctrine was tersely summarized by the Chief Justice, speaking for the Court as follows" (citing the language quoted above).

Referring to this statement of the law, and applying it to a particular state of facts, the Court in *United States v. Reading Company* (226 U. S. 324, 369) said):

"That the Act of Congress 'does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all' normal methods, whether by agreement or otherwise, to accomplish such purpose, was pointed out in the Standard Oil Case. In that case it was also said that the words 'restraint of trade' should be given a meaning which would not destroy the individual right of contract and

render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect. We reaffirm this view of the plain meaning of the statute, and in so doing limit ourselves to the inquiry as to whether this plan or system of contracts entered into according to a concerted scheme does not operate to unduly suppress competition and restrain freedom of commerce among the States."

In *Nash v. United States* (229 U. S. 373, 376) the result of the decisions is tersely summarized by Mr. Justice Holmes as follows:

"Those cases may be taken to have established that only such contracts and combinations are within the Act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade."

In the Powder Case (*United States v. E. I. Du Pont de Nemours & Co.*, 188 Fed. 127) the understanding of the Court of the result of the recent decisions in this Court is expressed as follows:

"It is undoubtedly the policy of the statute that competitive conditions in interstate trade should be maintained wherever their abolition would tend to suppress or diminish such trade. But this being true does not read into the statute a denunciation of all agreements that

may restrain competition without regard to their purpose or direct effect to restrain 'trade or commerce among the several states.' To what extent the anti-trust act condemns combinations that restrain full and free competition in interstate trade is a question that has been much debated. For a dozen years, at least, it has been settled that it does not condemn combinations which only indirectly, remotely, or incidentally restrain interstate trade.

"The recent decisions of the Supreme Court in *Standard Oil Co. v. United States*, and *American Tobacco Co. v. United States*, 221 U. S. 106, make it quite clear that the language of the anti-trust act is not to receive that literal construction which will impair rather than enhance freedom of interstate commerce. As we read those decisions, restraint of interstate trade and restraint of competition in interstate trade are not interchangeable expressions. There may be, under the anti-trust act, restraint of competition that does not amount to restraint of interstate trade, just as before the passage of the act there might have been restraint of competition that did not amount to a common-law restraint of trade."

In *United States v. Keystone Watch Co.* (218 Fed. 502, 507) it is said:

"To fall within the prohibition of the statute it is necessary that the unlawful restraint of trade—and this is not always the same thing as the mere restraint of competition—should be direct and not merely incidental, and it should also be undue or unreasonable."

If then it be true that the statute is aimed only at restraint of competition, which unduly restrains commerce, it follows that there may be a restraint of competition which does not unduly restrain commerce. But how can such due restraint of competition be brought about? We are dealing with a restraint to be effected by mutual concessions and not by superior authority, by parties, not by the State. It is plain that in the absence of superior authority due restraint of competition by ocean carriers can be effected only by the co-operation of the competitors themselves. But the power to raise and lower rates is among the most formidable of the weapons of competitive warfare. If the use of this weapon cannot be regulated it is impossible to see how competition can be regulated. To say that there can be no due restraint of competition which will regulate prices in ocean transportation under any circumstances for the purpose of steadying market rates, is practically to say that there can be no restraint of competition in that branch of commerce whatsoever, and thus to make the rule of reason when applied to it an empty phrase.

In determining what is proper co-operation among the competitors in order to regulate competition in any particular trade, regard must be had to the character of the parties, the business in which they are engaged, the relation in which it stands to the public, and the purpose which the regulation may be regarded as designed to serve. If it be demonstrated that the public interest is best served and the rights of parties best

protected by reasonable regulation among competitors, which will make and sustain reasonable rates, then it must be that such co-operation is due restraint of competition and cannot be undue restraint of commerce.

Having regard then to the parties and the subject matter here under consideration, it is earnestly contended by the defendants that the regulation of rates in ocean transportation is required by exigencies which are inherent in the nature of the business and which do not apply to transportation by rail. Competition in transportation on the sea can never be defeated, though regulation by mutual consent may hold it partially under control. This is so for the obvious reason that the ocean is a free highway and that steamers can be chartered in the markets of the world for any required service, or can be built for such service in a brief space of time. Hence, the needed steamer will always certainly be forthcoming if unreasonable or excessive rates are exacted. It is self evident, therefore, that no regulation of rates will be permanent unless they are kept at a reasonable level, and hence the self-interests of the parties will preclude unreasonable rates.

It is quite otherwise with railroads, which to a large extent monopolize the trade in the districts through which they run. There is always a tendency to raise rates in such localities. If then between competing points the railroads were permitted to combine upon their rates competition would be completely suppressed. But such a situation can never arise upon the ocean.

For these reasons and for others which have been pointed out, ocean transportation is *sui generis*.

It follows that the reasons which render combinations to regulate rates an unreasonable restraint of trade in the case of railroads, do not apply in the case of ocean transportation. The true limit of reasonable restraint is not the same in one as in the other. Accordingly, under the rule of reason, the same stringency should not be applied in the one case as in the other.

The evils of unrestricted competition in ocean transportation have been pointed out over and over again, not only in the evidence of the witnesses which appears in this record, but in Governmental Investigations and in the studies of economists.

We are dealing here with a subject of world-wide interest, where long experience has resulted in the evolution of effective modes of regulating this special phase of commerce, which have been found to be free from serious evils.

In the report of the Alexander Committee, referred to more fully later on, it is said (Vol. 4, p. 417):

"Steamship line representatives, as well as the patrons of the lines, were almost a unit in emphasizing to the Committee the importance and necessity of the aforementioned advantages of agreements and conferences, and in asserting that these advantages can only be effected by permitting the several lines in a given trade to coöperate in the regulation of their rates and the expeditious handling of their business. Very



few of the many exporters and importers, who communicated with the Committee, were opposed to agreements and conferences in themselves, provided they are fairly and honestly conducted."

Referring to this report as a whole, the Court below in its opinion said:

"There is nothing to add to the elaborate presentation of all sides of the controversy which will be found in that report, and we find it most persuasive to the conclusion that in view of the peculiarities of ocean transportation, the method adopted by the defendants—if purged of its obnoxious feature, the "fighting ship"—is a reasonable one, which, so far from restraining trade, really fosters and protects it by giving it a stability which insures more satisfactory public service for all concerned."

Long before the Sherman Anti-Trust Law was enacted, and for more than a quarter of a century since, agreements between ocean carriers to regulate the business in which they are competitors had been adopted in the trade of practically every maritime nation. There is submitted in the record a digest of decisions of the German Imperial Court (Vol. 10, beginning with Deft.'s Ex. 19-a, p. 4952, and extending to p. 5000) together with the Imperial laws and regulations, from which it will appear that agreements similar to that before the Court were valid under the German law before the adoption of the Sherman Anti-Trust Law; and testimony was introduced as to the German

law by the witness Mr. Schnitzler, a doctor of laws of the University of Leipsig (13 R. 1764), and that the agreement here in question is valid under that law. Testimony that the agreement is valid under the English and Canadian law was given by Mr. Isidor Frederick Helmuth, one of His Majesty's counsel in the Province of Ontario and a member of the Bar in England (13 R. 1835), and the accuracy of his statement of the laws is supported by the following authorities:

*Attorney General v. Adelaide S. S. Co.*, 1913  
A. C. 781;  
*Mogul S. S. Co. v. MacGregor*, 1892 A. C. 25;  
*Northwestern Salt Co. Ltd. v. Electrolytic  
Alkali Co.* 1914 A. C. 461.

That the consensus of opinion of those best qualified to judge is that, in the absence of international supervision, it is in the general interest of trade and commerce that competing carriers may agree to regulate the trade by maintaining reasonable and uniform rates so as to secure stability and that they may for a like purpose also adopt other regulations as to sailings, exchange of vessels and other provisions usually contained in conference agreements, is established by the evidence in this case and seems no longer open to doubt.

### 3. *The History of the Legislation.*

The interpretation of the statute for which we contend is borne out in our opinion, by the history

of the bill while in Congress, which may be dealt with briefly. It was introduced by Senator Sherman on the 14th of August, 1888, and was a bill to declare unlawful trusts and combinations in restraint of trade and production. After the enacting clause, the bill as introduced read:

“That all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view or which tend to prevent *full and free competition* in the production, manufacture or sale of articles of domestic growth or production or of the sale of articles imported into the United States, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which *tend to advance the cost to the consumer of any of such articles* are hereby declared to be against public policy, unlawful and void.”

After providing for suits for damages by persons injured, the statute proceeds:

“And any corporation doing business within the United States that acts or takes part in any such arrangement, contract, agreement, trust or combination *shall forfeit its corporate franchise* and it shall be the duty of the District Attorney of the United States of the district in which such corporation exists or does business to institute proceedings to enforce such forfeiture.”

Section 2 provided for suits for damages, and Section 3 provided a penalty for violation, making it a high misdemeanor punishable by a fine of not more than \$10,000 or by imprisonment in a penitentiary for a term of not more than five years or by both such fine and imprisonment, in the discretion of the Court.

A second bill introduced by him was evidently intended to apply only to imported articles.

On August 14, 1888, Mr. Sherman introduced a third anti-trust bill which denounced all arrangements, contracts, etc., which tend to prevent *full and free competition* in the importation, transportation or the sale of articles imported into the United States, or in the production, manufacture or sale of articles of domestic growth or production of domestic raw material that in due course of trade shall be transported from one territory or state to another, and declaring void and against public policy all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which tend to advance the cost to the consumer of any such article. By the second section he gave parties injured a right to sue for treble damages.

As introduced by Mr. Sherman, the bill was advocated by him and after weeks of debate on the importance of full and free competition, a short but epochal speech was made by Senator Platt, of Connecticut, in which he demonstrated that unrestricted competition was the death, not the life, of trade and commerce, calling attention to the fact that each of the

great trusts which had been mentioned in the debate were built upon the graves of smaller but prosperous concerns engaged in the same business, done to death by full and free competition. At the close of that speech the bill was referred to the Judiciary Committee of the Senate, with instructions to report it within twenty days, and within that period the bill was reported which became the law as it is upon the statute books to-day. In this bill the words "full and free competition" were eliminated, and the words "trade and commerce", which were not in any of the bills introduced by Mr. Sherman, were substituted.

On page 303 of a volume entitled "Bills and Debates Relating to Trusts", prepared by direction of the Attorney General and printed by the Government Printing Office in 1903, is contained the bill as it was referred to the Committee, with every line of it crossed out and the substitute therefor printed, and is followed by the bill reported from the Judiciary Committee which was passed by the Congress.

#### 4. *Reasonable Rates.*

The petition alleges that excessive and arbitrary rates are charged by the defendants for steerage transportation. No evidence in support of this allegation has been submitted. The Government now takes the position that the allegation is immaterial and contents itself with an attempt to show that the defendants' evidence does not establish that such rates are reasonable.

Mr. Drake, the executive officer of the Panama

Steamships, owned by the Panama Railroad Company, which is owned and controlled by the United States, and which are run in connection with the Panama Railroad Company, by the Government, stated that in his opinion a steamship line has to earn from 12 per cent. to 20 per cent. to make it equivalent to 6 per cent. earned by a railroad (13 R. 1663). The rates charged by the Government for the carriage of emigrants from New York to Colon, a distance of 1800 miles is \$30. Taking this as a criterion, the rate of \$35 or \$40 for carriage from Europe to the United States, a distance of 3,000 miles, would show that the steamship rates are certainly reasonable.

The evidence of Mr. Richard, who was called as a witness on behalf of the defendants, who has been in the steamship business forty years and had represented the Hamburg-American, Union, Hausa, Austro-Americano, Prince, Secula-Americana, Lloyd Italiano, New York, Continental Russian Volunteer, and North West Transport lines, is that the rates charged by the steamship companies are very reasonable (12 R. 814).

Mr. Winter, who was called by the defendants, passenger manager of North German Lloyd since 1885, testified that the rates were now slightly higher than in the early eighties, but that the passenger received a good deal more for his money than he did twenty years, or even fifteen years ago. There is a decided change in the quality and condition of the service (13 R. 1740). The evidence shows that the cost of ship building has gone up a marked degree (Lister, 13

R. 1509); wages have largely increased (1508); the cost of provisions and coal has advanced, and the emigrant receives proportionately much more than formerly.

Again, if we compare the rates charged by the steamship companies with those charged by the Italian lines which are fixed by Government regulation, it will be found that they compare favorably. The Italian rates are \$37 to \$42 (12 R. 937).

It appears also that the profits earned by the steamship lines, so far as they are reflected in the evidence, are extremely moderate. The Cunard Line has paid dividends on its actual capital averaging about 2.81 per cent. during the thirty years previous to 1912; 3.31 per cent. during the ten years prior to that date and 2.75 per cent. since the making of agreement AA (Lister, 13 R. 1516).

The Canadian Pacific has earned about 7 per cent. upon its capital, not deducting depreciation, which would reduce the net earnings to about 3 per cent. (13 R. 1599, 1600).

The dividends on the Hamburg-American Line are shown in Exhibit 24 (10 R. 5102) and average 6.95 per cent.

The dividends on the North German Lloyd are shown in Exhibit 21 (10 R. 5094) and average 6.04 per cent.

We submit with entire confidence that this record shows not only that the rates charged have not been extortionate or unreasonable, and that the purpose and

effect of the agreement has not been to increase rates, but, on the contrary, that the rates have been reasonable and stable, and that without such agreement they would have been neither.

5. *Pooling agreements respecting passengers.*

In the dissenting opinion in *United States v. Freight Association* (166 U. S. 364), the Justice writing the opinion refers to the reports of the Interstate Commerce Commission and cites statements from those reports "indicating that agreements among carriers, competitive as well as connecting, for the purpose of securing a uniform classification and preventing of undercutting of rates, under-billing, etc., existed prior to the Interstate Commerce Act, were continued thereafter and were deemed not to be forbidden by law, but on the contrary were considered as instruments tending to secure its successful evolution". By the fifth section of the Interstate Commerce Act pooling of freights of competing roads is prohibited, and this section is commented upon in the decision just referred to. It is to be noted that the inhibition in respect to pooling is confined to freight and does not extend to passengers. In the opinion of the Interstate Commerce Commission *In the Matter of Transportation of Immigrants from New York and other Atlantic Ports to Western Destinations* (10 I. C. R. 13) this omission of a prohibition in respect to pooling passengers is referred to. That reported opinion was occasioned by the practice referred to above of distributing immigrants at the port of destination at



the City of New York among the trunk Railroad lines in equal proportions.

The Inter-State Commerce Act does not prohibit the apportionment of passengers by a pooling agreement among railroad companies engaged in inter-state and foreign transportation of *passengers*. Section 5 of that Act, generally known as the Anti-Pooling section, is as follows:

"SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination, with any other common carrier or carriers for the pooling of *freights* of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in case of an agreement for the pooling of *freights* as aforesaid, each day of its continuance shall be deemed a separate offense."

The pooling of *freights* is forbidden, but not the pooling of *passengers*, and, therefore, under the rule *expressio unius, exclusio alterius*, the pooling of passengers is permitted.

For many years, with full notice to, and co-operation by the Government, the immigrants brought hither from foreign ports by the defendant lines have been divided by agreement among the railroad carriers for transportation to their destination.

*Matter of Transportation of Immigrants*, 10  
I. C. R. R. 13.

In general the agreement of the steamship lines in the Western Passenger Association results in the delivery of all passengers holding immigrant rail orders to the rail lines as nearly as may be in equal proportions, the Railway Companies paying to the Steamship Company a percentage upon the through rate from New York to destination as commission. The conclusion of the Commission was stated as follows (p. 27):

"The circumstances and conditions of this immigration traffic were not considered by the framers of the Act at the time of its passage. Out of it there appears to arise no injustice to domestic shippers or passengers unless by it there be restraint of competition resulting in higher passenger rates than would otherwise prevail. While large in the aggregate, it is insignificant in comparison with our general traffic, only ten or twelve per cent passing beyond the Western termini of the trunk lines. There is no discrimination as against individuals, classes or localities, since the immigrants are forwarded at domestic published rates. From the viewpoint of expediency there would seem to be no cause for interference in the hope of righting any great wrong to individuals or interests or in creating a better condition for the immigrants themselves or in respect to the importation of diseases or undesirable immigrants. These considerations would perhaps have no place in the determination of the matters involved if the law were free from doubt, it being our duty to enforce the same as it is found."

This pooling arrangement, which has been found to be of great value to immigrants arriving at Ellis Island, as appears from the testimony in this case (*post* p. 63), has continued until the present time, and is thus recognized as being expedient and as not obnoxious to the pooling provision of the Interstate Commerce Law.

At the time when the Sherman Anti-Trust Law was enacted, therefore, in 1890, there was a distinction recognized between pooling arrangements regarding freight and passengers, and it may justly be inferred that Congress recognized this distinction as based upon reasonable grounds existing in the nature of the business. The restraint of competition with regard to one subject matter was deemed injurious to the public interest where a similar restraint with regard to the other subject matter was not so regarded.

In *Cosmopolitan Shipping Co. v. Hamburg-American Packet Co.* (13 I. C. R. 266), the petitioner undertook to bring before the Commission by way of complaint what was known as the "Baltic Pool", an alleged illegal pooling of freight by the defendant and other steamship companies, and it was held that the Commission had no jurisdiction over the subject of ocean rates.

#### *6. Report of the Alexander Committee.*

The report of the Committee on the Merchant Marine and Fisheries in the investigation of shipping combinations (63rd Congress, Second Session, Doc. 805), known as the Alexander Committee, was made pursuant

to a resolution of the House of Representatives. That committee examined a large number of witnesses representing various lines, some of which had agreements or affiliations with other lines and some of which were independent. They examined eighty agreements or understandings involving practically all the regular steamship lines operating on nearly every American foreign trade route.

Steerage agreements similar to that in this case are described as follows (Vol. 4, p. 23):

"The steerage agreements allot to each line a certain percentage of the total traffic moving via certain ports, and operate on the plan that if one of the lines finds itself carrying far in excess of what it knows is its allotted percentage it must temporarily raise its rates, thus automatically throwing the excess business coming to itself to some other line which is falling short of its share of the total traffic. As soon as the line raises its rates it advises the Secretary of the Conference of the raise who at once communicates the fact to all the other lines. The several lines also obligate themselves to furnish weekly traffic statistics to the Secretary of the Conference, who keeps accounts of the same for all lines and furnishes the results to all the members of the Conference. In this way every line knows from time to time the relative standing of the other lines, as far as their share of the total traffic is concerned. In case any line exceeding its allotted share should not seek to di-

vert traffic from itself by raising rates, it may be compelled to do so by Conference action.

"Mr. P. A. S. Franklin, Vice President of the International Mercantile Marine Company, in his testimony before the Committee (Vol. 1, p. 582) emphasized the fact that no line is permitted to reduce its rate below a certain minimum in order to obtain a stipulated share of the business, and that the spirit of the agreement is not to reduce rates, but, instead, to have any line exceeding its share advance its rates with a view to letting the other lines take the business. Moreover, if at the end of certain periods the accounts show that some lines carried in excess of their allotted portion, the agreements compel them to pay into a pool a certain sum per excess passenger for the benefit of the lines which carried less than their proportion. It therefore follows that a line exceeding its proportion might as well force the business to the other lines by raising its rates instead of carrying the business and paying back the money into the pool. It also follows that it is not to the interest of any line to cut rates below the minimum, because, according to the pooling arrangement, if it is not obtaining its share of the business, it is, nevertheless, getting its share of the money. On the other hand, there is no incentive for any line to acquire more than its share of the traffic, because, as Mr. Franklin testified, 'the line which is getting an excess of business is putting out more money and effort and is using that capital and obtaining no return on it.'

"Thus it is seen that the steerage agreements

have been so arranged that the various lines will find it to their interest to carry exactly those proportions of the traffic which they considered a fair division and which they bargained to give each other. To do otherwise, it is argued, would mean that the line which brings new ships into the trade would have them filled all the time, and that the lines with the most powerful financial backing would acquire much more than their fair share of the trade, thus bringing the situation to a question of the survival of the fittest. It has been ably argued before the Committee by Mr. Franklin and others that it has always been their experience that it is most difficult for each of a large number of lines operating under different conditions and from numerous competing ports and running different types of vessels—some old and some new—to maintain a fair percentage of the business unless they agree to combine and limit their actions. The consensus of the testimony before the Committee has been to the effect that the only practicable method of securing a fair share of business for all the lines, thus preserving the weaker ones, and of substituting harmony in place of discord and cut-throat competition, is through some form of pooling as just described, and that the primary purpose of such pooling agreements is to maintain a reasonable price and prevent the line or lines with unlimited capital for development from ultimately acquiring the whole business.

“It should also be noted that the steerage traffic agreements are in the nature of bargains between the lines, usually made for a

few years only, and thereafter to continue from year to year unless discontinued. The agreements, in other words, are not made forever, and this fact is important in relation to the oft-repeated assertion that such agreements eliminate all competition or furnish no inducement for certain lines to obtain their share of the business. Minimum rates, it is true, are established in all the trades; but it is also true that if a line demonstrates over a period of years that it cannot carry its percentage of the traffic it may, at the next revision of the agreement, five or ten years later, be unable to prevent a reduction in its allotted percentage of the trade. From the standpoint of future bargaining, therefore, it is every line's desire to carry its full percentage of the business and to demonstrate that it is entitled to its allotted share. *As a result, there is always very keen competition between the lines in the solicitation of business in order to maintain their percentage.*" (Italic ours.)

The conclusions reached by the Committee are in part stated as follows:

"In formulating its recommendations it became apparent to the Committee, in view of all the facts presented, that only two courses of action were open for adoption. Either the agreements and understandings, now so universally used, may be prohibited with a view to attempting the restoration of unrestricted competition, or the same may be recognized along lines which would eliminate existing dis-

advantages and abuses. It is claimed that the adoption of the first course—the prohibition of co-operative arrangements between practically all the lines in nearly all the divisions of our foreign trade—would not only involve a wholesale disturbance of existing conditions in the shipping business but would deprive American exporters and importers of the advantages claimed as resulting from agreements and conferences if honestly and fairly conducted, such as greater regularity and frequency of service, stability and uniformity of rates, economy in the cost of service, better distribution of sailings, maintenance of American and European rates to foreign markets on a parity, and equal treatment of shippers through the elimination of secret arrangements and underhanded methods of discrimination. (A classification of the advantages claimed as resulting from the aforementioned factors is presented on pp. 295 to 303 of the foregoing report.)

“These advantages, the Committee believes, can be secured only by permitting the several lines in any given trade to co-operate through some form of rate and pooling arrangement under Government supervision and control. It is the view of the Committee that open competition cannot be assured for any length of time by ordering existing agreements terminated. The entire history of steamship agreements shows that in ocean commerce there is no happy medium between war and peace when several lines engage in the same trade. Most of the numerous agreements and conference



arrangements discussed in the foregoing report were the outcome of rate wars, and represent a truce between the contending lines. To terminate existing agreements would necessarily bring about one of two results: the lines would either engage in rate wars which would mean the elimination of the weak and the survival of the strong, or, to avoid a costly struggle, they would consolidate through common ownership. Neither result can be prevented by legislation, and either would mean a monopoly fully as effective, and it is believed more so, than can exist by virtue of an agreement. Moreover, steamship agreements and conferences are not confined to the lines engaging in the foreign trade of the United States. They are as universally used in the foreign trade of other countries as in our own. The merchants of these countries now enjoy the foregoing advantages of co-operative arrangements, and to restore open and cutthroat competition among the lines serving the United States would place American exporters at a disadvantage in many markets as compared with their foreign competitors."

#### *7. International Conference.*

The International Institute of Agriculture is a permanent Government institution created by treaties signed June 7, 1905, between the United States and fifty-three other nations. The Institute is authorized and directed, among other things, to submit to the approval of the Governments measures for the protection

of the common interests of farmers. Mr. David Lubin is the American delegate. At the last Congress a resolution was adopted instructing the American delegate to present to the permanent committee of the Institute for action certain resolutions, among others instructing the Institute to invite the adhering governments to participate in an international conference on the subject of steadying the world's price of the staples. This resolution was adopted September 15, 1914, and approved by the President September 24, 1914 (Pub. Res. No. 50, 63d Con., 38 Statutes, 779). In support of this resolution there was laid before the House a paper which had been submitted by Mr. Lubin before the Committee on Foreign Affairs, which contains matter that serves to illuminate the subject under investigation. He says:

“Experience has made it plain over and over again that in the world of industry there is just one field in which competition, if allowed to operate, leads in the end to the *reductio ad absurdum* of the whole competitive system. The field that I refer to is that of transportation; competition in transportation impedes and interferes with the free play of competition in other and important fields. This fact has been brought home so clearly to the American people that they have enacted laws excluding the railway carriers from the domain of competition by placing the regulation and control of rates in the hands of the Interstate Commerce Commission, and the same reasoning that holds good for the regulation and control of railroad rates by an Inter-

state Commerce Commission would, as was shown before, likewise hold good for the regulation and control of ocean carriers through an International Commerce Commission."

A curious circumstance is that complaint is made that staple articles are not covered by rate agreements between the carriers, with the result that rates for staple articles (meaning by "staple articles", bulky articles such as grain, flour, etc.) fluctuate violently from day to day, whereas on package traffic, which is covered by steamship regulation, rates can be changed only upon thirty or sixty days notice and therefore are more stable.

Since no International Commission is now in existence or is likely to be in existence for many years to come, there remains no way in which rates can be regulated between ocean carriers unless it be by mutual agreement. No law which Congress might pass could reach the situation, since the utmost that could be provided would be to prohibit foreign vessels from landing at our ports if they violated statutory requirements or by penalties which might produce the same result.

*8. Necessity for and beneficial effect of Conference Agreement.*

In reply to the uniform opinion expressed by the witnesses and by experts as to the necessity for and the benefits which result from the regulation of business by such a system as that embodied in the participation agreement, the petitioner relies upon cases which may

each have been properly decided, having regard to the subject matter and the circumstances of the particular case, but which we contend are not authority here because of the inherent nature of the business and the exigencies which surround it. It is said (Petr. brief, p. 114) that it is not established that ruinous or even excessive competition would break out if there were no regulation. But the opinion of the witnesses who have been examined, both for the Government and for the defendants, is to the contrary. They uniformly concur in the statement that ocean carriage cannot be conducted under modern conditions without some form of co-operative agreement between the carriers (Lister, 13 R. 1564; Winter, 13 R. 1739; Hannah, 13 R. 1484; Cauty, 12 R. 1096, 1097; Richard, 12 R. 790, 938). The fundamental reason for the opinion given by each of the witnesses, is that experience demonstrates that such conference agreements alone bring about stability in the trade (Lister, 13 R. 1520). This is important to the emigrant, because while a fluctuating rate may at one time enable him to pay a low price, at another time he is required to pay an exorbitantly high price. It is important to the shipping lines, because it enables them to make a forecast for the future and to safely contract for the building of new and improved ships (13 R. 1502). Fluctuating rates have a tendency also to induce immigration of a low grade of persons who are undesirable citizens (Hannah, 13 R. 1485); Lister, 13 R. 1557; Winter, 13 R. 1752). All these are matters of public interest. It is

also a matter of public interest that competitive warfare should not be carried to the extreme of driving the weaker competitor out of the business. The evidence shows that that has been a result of excessive competition with regard to a number of famous lines, notably the Guion Line, the National Line, the Inman Line, all of which perished from unregulated competition (Hannah, 13 R. 1436).

Mr. Hannah, who was formerly connected with the Inman Line and is now passenger manager of the Allan Line, testified as follows (13 R. 1436):

“Q. I will put this question to you and you may illustrate it by your experience—I think you have sufficiently shown that you are an expert—whether or not it is necessary that there should be understandings among steamship lines by way of regulating competition? A. I certainly believe it is absolutely necessary.

Q. Now go on and tell me why from your experience you believe it necessary. A. The Inman Company with which I was identified from 1869 until it went out of existence, was at one time one of the most prosperous lines, and it was followed into business by the National Line, established to do the same class of business, and later by the Guion Line. Those three lines were strong lines in the trans-Atlantic trade; they all perished because of unregulated competition. I might add to that also the Monarch Line, which came into business later, and still later the State Line. So there are five lines that perished in the trans-Atlantic

trade. Five out of eight British lines that did not survive.

Q. What do you mean by perished? A. They were driven out of business; they failed; they became bankrupt.

Q. And were picked up by other lines? A. Some of them were and some of them were simply abandoned. The National Line was bought up, and I think the present Atlantic Transport Line is the lineal successor of the National Line, and the Guion Line has no successor; it has simply gone out of existence. \* \* \* Competition, fighting rates down sometimes as low as ten dollars, which meant less than \$8 to the steamship company for carrying a passenger 3,000 miles, and the heavy cost of running the ship; steerage traffic not bearing its proportion of that cost; the ships running at a loss, soon exhausted the resources of the company, and they went out of existence one after another. And only the stronger ones lived and then indeed those that were strong at one time became weak and finally, as I have said, failed.

Q. And that was due to no cause except unrestricted competition? A. None at all, no, sir. Of course we have had commercial depressions which added to the strength of the competition, and what is true of New York here is equally true in Montreal, where we have now only one of the three original lines today, the one with which I am at present identified; there were three and now there is only one of those three.

Q. What three were they? A. The three

were the Allan Line and the Dominion Line and the Beaver Line. Now, there is no Beaver Line now, and the Dominion Line has been absorbed by the White Star or the American National Mercantile Marine——

Q. Were those lines prosperous lines at one time? A. At one time they enjoyed a fair degree of prosperity. I don't think they were ever strong lines, and they lasted in Montreal—I think one of them for probably 25 years—both of them nearly that length of time, and then went out.

Q. What was the cause of their going out of business? A. Over competition; unregulated rates \* \* \* to-day our rates for steamers that make the passage in five or six days' less time, and are three times as large as those were, and I suppose ten times as well fitted up, our present rate is \$31.25, or \$8.75 less than they were back in 1869.

Q. What was furnished to the steerage passengers at the time you mention? A. In my earlier days in this business the steerage passenger had to buy what is called his own outfit; these outfits were sold on the wharf here in New York, and at Liverpool and Glasgow—wherever the steamer sailed from. The bundle was tied together, consisting of a mattress, blanket and a pillow, and a tin pan and a tin pail for washing in, and knife and fork and spoon and a cup, and the whole of that cost ten shillings, or \$2.50. The passenger carried it on board on his back or his arm and it was abandoned when he left the ship—thrown overboard. That really had to be

added to the price of his passage, so what I called \$40 cost him \$42.50. They were absolutely necessary. The food was carried around in large tin pans and the steward dug a fork into the pan and put a chunk of beef on his tin plate, filled his cup with coffee or tea, as the case might be and passed on to the next."

The Court will find on pages 1439-1440, from this same witness, a delineating comparison of the accommodations afforded at the higher rate before 1860, or at all events from 1860 to 1880.

It is also worthy of comment that the views expressed by the shipping men who were called as witnesses are corroborated by the opinions of the Committee appointed by Congress to investigate the shipping combinations, (the Alexander Committee), and by the unanimous judgment of the four Judges of the Second Circuit, three of whom have spent the larger part of their lives in the study of the law of shipping, and who are perhaps as competent as men well can be to pass upon the reasonableness of the system placed in operation under the participation agreement.



### **POINT III.**

#### **The agency restriction.**

We have previously stated (*supra*, p. 16) the terms of the regulation (conference rule 9, 5 R. 2285), which prohibits conference agents from booking passengers for any steamer other than those in the conference lines. The Government complains that this is a true secondary "boycott", a combination to coerce A to cease dealing with B, in order to injure B. But manifestly this is not so. There is no attempt on the part of the conference lines to interfere in any way with the agent of any independent line. They simply bargain for the exclusive service of their own agents. Indeed, under well known principles, it would be a violation of the duty of the agent to accept inconsistent employment from a competitor. There seems to be no reason why one cannot bargain for the exclusive services of an agent or why several persons jointly may not bargain for such exclusive service.

Apart from this, the record shows that the careful selection of steamship agents in the immigrant business, and a rigid control over them, are extremely important in protecting the interests of the immigrant class, a class particularly liable to imposition by reason oftentimes of their ignorance of the language and their unfamiliarity with business. Mr. Hannah described the conditions which existed forty years ago at the City of New York and which continued until the conference took hold of it and stopped the payment

of commissions to runners (13 R. 1451, 1453). These regulations prohibit agents from cutting rates (Nyland, 11 R. 498), in order not to discriminate against the public. Stable rates are particularly needed where tickets are sold by a horde of agents. One of the reasons for the regulation of agents is well stated by Mr. Winter when he says:

"If I have an agent whom I have educated up in the business and on whom I have spent a good deal of money, I do not propose to have somebody else whom I do not know and who is inimical to us come in and avail himself of his services and cut into our business" (13 R. 1743).

This we think is ordinary business prudence, which requires no further justification.

### *The Effect of Agency Regulation.*

Mr. Hannah, who is connected with the Allan Line Steamship Company, testified that he had been in the steamship business in New York and Canada nearly all his life. He said that the agency system had been in operation as long as there had been any steamship companies running. The difficulty that existed, say, forty years ago in New York was that anybody, almost, could get a commission on a steamship ticket. He said he knew of a policeman making \$30. a day by running passengers into the steamship offices and getting \$3. for every one he brought into the office.

He said that he had known in Liberty Street where

there were two or three what they called "bunco" offices, where passengers were run in to get their tickets and money exchanged, and who got half-sovereigns for sovereigns and pieces of lead for money; that they attempted to prosecute these places many times; that along Wall Street there were "bunco" shops, and exchange offices, so-called, for roping in emigrants. This state of affairs existed in New York from 1870 to 1880.

One of the good things about the Conference is that it has stopped the swindling of emigrants. The agents at that time were irresponsible. They simply swindled the emigrants for a living, but the better class of them got an agent's commission of \$3. One effect of the agency system has been that the emigrant has not been swindled. The agreement between the steamship lines in conference stopped the payment of commissions to runners at the boarding houses and places such as these exchange offices, and stopped the payment of commissions to any and everybody except authorized agents, who hold the company's ticket and a commission only is paid on the agency ticket by the agent to the passenger. Under the old system the passenger was sometimes booked for one vessel when he thought he was booked for another vessel and the runner would get a higher price (3 R. 1451).

Another mischief that was corrected by the agency agreement was the sale of tickets by certain steamship companies and then procuring lower rates by clubbing the tickets together (13 R. 1489-91).

*Circulars and Publications.*

Criticism is also made of the regulation in Article 16 which reads as follows:

"No circulars or publications shall be issued by any line reflecting upon or instituting comparisons with any Conference line unfavorable to the latter, and no party hereto shall support any newspaper which may systematically attack any Conference line."

We submit that no sinister or dishonest purpose can be found in this regulation. No party is precluded from advertising the advantages or benefits which it has to afford the public. Freedom of competition ought not to be carried so far as to require that unfavorable comment should be made upon one's competitors, and, surely, no persons should be required to support a newspaper which systematically attacks him or those with whom he is associated, or to furnish advertisements to such newspapers.

**POINT IV.****The commercial allowances.**

The agreement between the Western Railroad Association and the steamship lines which provides for the payment of a commission allowance on all west-bound passengers holding inland emigrant rail orders, landing at Ellis Island and ticketed by railroad lines

at Ellis Island have been already cited (*supra*, p. 18). The passenger purchases at the same time both his passage by ship and also his railroad ticket to his destination, or from his place of purchase to the shipping port. These tickets are sold by the ship's agent, and for this service the railroad makes an allowance to the conference (Sandford, 11 R. 364, 369). The benefits of this arrangement are detailed by Mr. McCain (12 R. 877):

"The reason for the carriers making the commercial allowances to the railroads, which they think they are fully justified in doing, is that they act in the capacity of agents. The only thing, the financial feature, touched upon as part of the agency's service, is the furnishing of our tariffs to the emigrant, and I presume they are translated in certain countries, to some extent, where they are needed, and all of that is regarded by the carrier as an agency service, for which they think they are fully justified in receiving compensation by commission."

The steamship agent abroad sells the railroad ticket (12 R. 2626) or an order for it. The method in which this business is conducted at Ellis Island is detailed by Mr. McCain (12 R. 848): the railroads have an agency at Ellis Island, where they are tenants of the United States Government. As the emigrants are passed by the Government they are cared for by the agents of the railroads, among whom they are apportioned equally as nearly as may be. They are

thus assisted without being left unprotected in a strange land. The benefits of the system to the emigrant are those described by Mr. McCain, who is the Chairman of the Trunk Line Association:

"If the present arrangements of agency service as performed by the steamship companies throughout the interior foreign countries, was interfered with, that might be found to be a disadvantage to the emigrant, and it is assumed if this allowance were not made, there might be some curtailment of that service, when it seems to be an advantage to the emigrant to be able to get his tickets abroad for his entire journey; and if the arrangement as at present in effect were disturbed, why some other form of agency would probably have to be established so that the emigrant might get his through ticket; and to that extent indirectly it might be considered that the emigrant was benefited by the paying of the allowance for what the carriers term and consider an agency service, and which the steamship companies employ in order to furnish the emigrants with their through tickets and arrangements" (12 R. 872).

The issues raised by the petition and answer do not present for consideration the propriety of these commercial allowances.

The petition, while specifying the grounds of complaint as to specific methods of unfair competition, does

not allude to this subject. The evidence as it was offered was objected to as not within the issues and we submit that it was improperly admitted and should now be disregarded.

### **POINT V.**

#### **The Canadian Pacific Railway Company.**

The Canadian Pacific Railway Company, owning and operating a line of steamships sailing from Canadian ports, denied in its answer the allegation of the petition that it is a "common carrier of passengers and freight, including third class or steerage passengers, between the ports in the United States and ports or points in Europe, Asia or Africa". It admits that it carries from certain inland points to the United States persons to whom it has sold contracts for steerage transportation on its steamers sailing from Canadian ports to the port of Liverpool in England, but avers that the contracts for such railroad transportation are entirely separate and distinct from said contract for steerage transportation. It denies that in respect to any commerce in which it is engaged or otherwise it is violating or has violated in any way any of the provisions of the Act of Congress of the United States entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890 (11 R. 204).

It appears from the evidence that this defendant operates in the United States about 197 miles of road (13 R. 1589).

Its steamships do not go into or sail from any port of the United States (Kerr, 13 R. 1590-1592). Its participation under the agreement A-A is confined to east-bound traffic (Kerr, 13 R. 1591; A-A Agmt., Art. 3, 11 R. 41).

The defendant contends that it is not liable in this suit for the reasons:

1. That the Sherman Act cannot be applied extra-territorially as to foreign citizens, and that none of its business affected by the participation agreement or, if any, an insignificant portion, is transacted in the United States.

2. That it had given notice of its withdrawal from the participation agreement before the institution of this suit, and that the withdrawal became effective long before the making of the decree.

3. Steerage passengers are shipped from Montreal or Quebec to Liverpool and from Liverpool they are delivered at Quebec, where, under the Canadian law, immigrants must land (13 R. 1632). The Canadian Pacific Railway runs a few short lines into the United States, one to Holton, in Maine, a distance of three miles (13 R. 1633); another to Presque Isle, a distance of 29.2 miles, and another into the State of Vermont, a distance of 21 miles (13 R. 1633, 1634).

The main line from Montreal to Halifax runs a part of the way through the State of Maine, in all not exceeding 150 miles (13 R. 163). When the St. Lawrence is closed in Winter by reason of the ice, passengers are sent by rail from Montreal to Halifax,



and a part of this line, as we have said, runs over American territory.

When tickets are sold in the United States, if the passenger desires to go to a European port, he will be sold a railroad ticket to Montreal and a steamship ticket from Montreal to Liverpool and an order for his railroad trip from Liverpool to his point of destination in England (Kerr, 13 R. 1594). Mr. Kerr describes fully the *modus operandi* in the sale of a ticket from Chicago (13 R. 1594). The only portion of the transportation of an immigrant eastward from Halifax to Montreal which could come within the operation of the participation agreement, would be so much of the rail route as is in the State of Maine. This is utilized during some parts of the Winter months, as we have stated. At other times the traffic is exclusively between the Canadian and English ports. As to this latter traffic there seems to be no reason to doubt that it is extra-territorial and not within the penal or other provisions of the Sherman Anti-Trust Law.

*American Banana Co. v. United Fruit Co.*, 213

U. S. 347.

There is no doubt that in entering into the agreement this defendant had no intention of violating the laws of the United States. Mr. Kerr says:

"We never dreamed that we would be in any breach of any law of the United States, not operating ships to and from ports in the United States in connection with this business. But when we found that the United States Govern-

ment was not pleased over the arrangement, why that had an influence with us of course, in cancelling this arrangement" (13 R. 1593, 1594).

Emigrants arriving at Halifax in the Winter and carried by rail to Montreal are not permitted to leave the train until they reach destination in Canada.

Under these circumstances the most that can be urged is that this Court has the power, if it shall find that the participation agreement is a violation of the Sherman Anti-Trust Law, to enjoin the Canadian Pacific from carrying passengers over the portion of their line in this country.

4. The Canadian Pacific served a notice of withdrawal from the participation agreement on November 26, 1910. Three months' notice is required. Accordingly, their connection with the participation agreement ceased March 1, 1911. This is pleaded in the answer of the Company (11 R. 209). The decree in this suit was made November 9, 1914.

The general rule in equity is that equity adapts its relief to the state of facts existing not at the beginning but at the close of litigation.

*Randel v. Brown*, 2 How. 406.

The Government contends that under the decision in the Trans-Missouri case it is entitled to a decree as of the date of filing of the petition. In that case the party withdrew from the agreement after the decree and pending an appeal.

In the brief for the Government it is said (p. 37):

"It may be doubted, however, whether there was, in fact, any *bona fide* withdrawal."

Again (p. 40):

"We submit, therefore, that there has been no *bona fide* withdrawal on the part of either the Allan Line, the Canadian Pacific Railway Company or the Russian East Asiatic Company."

In a foot note (pp. 37, 38, 39 and 40), there are citations of testimony from which possibly it might be argued that the withdrawal of the Allan Line was not effective, and that the withdrawal of the Russian East Asiatic Company was not made in good faith; but there is not a syllable of evidence, express or implied, which by any ingenuity can be tortured into a meaning which will call in question the good faith of the action of the Canadian Pacific Railway Company.

**The decree of the Court below should be affirmed.**

Respectfully submitted,

SPOONER & COTTON,

Solicitors for Hamburg-Amerikanische  
Packetfahrt-Actien Gesellschaft, The  
Allan Steamship Company and The  
Canadian Pacific Railway Company.

October, 1915.

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